LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 31
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner

vs.

JOSEPH C. O'NEILL,

Respondent

CERTIORARI TO SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

L. J. CUSHMAN
Attorney for Respondent
706 Ainsley Building
Miami 32, Florida
Phone FRanklin 3-6383

INDEX

PAGE

History Of The Act 3

The Challenged Act Was Invalid as an Unconstitutional Restriction Upon the Right of Free Ingress and Egress From State to State 6

The States of the Union Possess No Power, Even To Surrender a Fugitive From Justice to a Sister State Except Such Power as is Conferred By Sec. 2 of Art. 4 of the U. S. Constitution and Have No Power Whatever To Surrender Any Citizen to a Sister State Unless That Power Is Conferred By The U. S. Constitution 15

Sub-Section 3 of Sec. 942.02 F.S. 1955 Violates the 14th Amendment to the Constitution of the United States in Denying Due Process of Law 30

Due Process Requires That Civil Remedies For Seizure of Property Be Granted Only Upon Affidavit Stating Facts—At Least Such Showing Should Be Required to Authorize Seizure of Person 36

The Statute Clearly Violates the 14th Amendment to The Constitution of The United States in Failing To Provide For Bail 39

The State of Florida Cannot Constitutionally Enact A Statute Authorizing Issuance of Criminal Process Beyond The Limits of This State 44

Petitioner's Brief 56

PAGE

Petitioner's Arguments Overlook The Effect of The 14th Amendment 57

The Provision Attempting To Authorize Issuance of Process Running Beyond State Boundaries Is Likewise Unconstitutional and Void 63

Conclusion 65

Appendix Pages

Appendix "A"—In re O'Neill, 9 Fla. Supp. 153, opinion of lower nisi prius court 1-18

Appendix "B"—Application of People of New York v. O'Neill, (Fla) 100 So. 2d 149, opinion of Supreme Court of Florida 18-34

TABLE OF CASES AND AUTHORITIES CITED

PAGE

4 Am. Jur. "Arrest"—Sec. 19, p. 14 47

6 Am. Jur. "Bail and Recognizance"—66 42

22 Am. Jur. "Extradition" 247, 248 18

28 Am. Jur. "Injunctions"—217 37

Apalachicola Northern R. Co. v. Sommers, 79 Fla. 816, 85 So. 361 37

Application of People of New York v. O'Neill (Fla) 100 So. 2d. 149 (Appendix pp. 18-34) 3, 4, 5, 6, 23, 63, 66

Beckwith v. Bailey 119 Fla 316, 161 So. 576 ..... 45, 47, 54

Black's Law Dict. 566 36

Bozovichar v. State (2nd) 103 N.E. 2d. 680 42

Colgate v. Harvey, 296 U.S. 404, 80 L. Ed. 299, 56 S. Ct. 252, 102 A.L.R. 54 ..... 58, 59, 65

Collier v. Vaccaro, (CCA-4) 51 F. 2d. 17 53

Commonwealth v. Klaus, 130 N.Y.S. 713 ..... 5, 6

16 C.J.S. "Constitutional Law" 987, 988 7

16 A C.J.S. "Constitutional Law"—167, 168 ..... 9, 10

16 A C.J.S. "Constitutional Law"—172 14

16 A C.J.S. "Constitutional Law"—634 38

Table of Cases and Authorities Cited (cont.)

PAGE

35 C.J.S. "Extradition" 319 17

72 C.J.S. "Process"—997 45

Conrad v. Van Buren, 144 Mich. 492, 108 N.W. 347 ..... 33, 38

Crawford v. Bradford, 23 Fla. 404, 2 So. 762 37

Edwards v. California, 314 U.S. 160, 62 S. Ct. 164
86 L. Ed. 119 ..... 12, 63

Ennist v. Baden, (Fla) 28 So. 2d. 160 19

Ex Parte McDaniel, 86 Fla. 145, 97 So. 317 39

Ex Parte Montgomery, 244 Fed. 967 20

Ex Parte Morgan, 20 Fed. 298 20

Ex Parte Owen, 10 Okla. Cr. 284, 136 P. 197 19

Ex Parte Thompson, 85 N.J. Eq. 221, 96 A. 102 20

3 Fla. Jur. "Arrest"—55 45

In re Allen, 49 Pa. D. & C. 631 ..... 4, 5, 6, 22, 23, 62

In re Cooper, 127 N.J.L. 312, 22 A. 2d. 532 ..... 4, 43

In re O'Neill, 9 Fla. Supp. 153 ..... 3, 5, 6, 22

In re Saperstein, 30 N.J. Super. 373, 104 A. 2d. 842 ..... 4, 43

Kentucky v. Dennison, 24 Haw. 66 ..... 22, 60

Table of Cases and Authorities Cited (cont.)

PAGE

Kirkes v. Askew, 32 Fed. Supp. 802 ..... 50, 65

McLean v. State of Miss. (C.C.A-5) 96 F. 2d. 741, 119 A.L.R. 670 cert. den. 305 U.S. 623, 59 S.Ct. 84, 83 L.Ed 399 ..... 51, 54, 65

Mandeville v. Guernsey, 5 Barb. (N.Y.) 99, Affd 50 N.Y. 669 52

Mirror Lake Co. v. Kirk Securities Corp., 98 Fla. 946, 124 So. 722 37

1 New Cent. Dict. 405 36

Opinions of Atty. Gen. 1951-1952-764 ..... 45, 46

Panhandle Eastern P. Line v. State Highway Comm., 294 U.S. 613, 55 S. Ct. 563 62

Passett v. Chase, 91 Fla. 522, 107 So. 689 ..... 45, 48, 54

Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 ..... 46, 65

People ex rel Kapel v. Bingham, 102 N.Y.S. 878, 189 N.Y. 127, 81 N.E. 773 20

People v. Hyatt, 122 N.Y. 176, 46 N.E. 825 19

2 Selected Essays on Constitution Law 429, 430 10

State v. Chase, 91 Fla. 413, 107 So. 541 ..... 16, 19, 21

State v. Quigg, 91 Fla. 197, 107 So. 409 15

PAGE

Terrell v. State Life Ins. Co., 107 Fla. 450, 145 So. 220 37

United States v. O'Brien, Sheriff (C.C.A-7) 138 F. 2d. 217 61

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

FLORIDA STATUTES

Sec. 76.03 F.S. 1955 37

Sec. 76.08 F.S. 1955 37

Sub. Sec. 2. Sec. 942.02 F.S. 1955 ..... 5, 44

Sub. Sec. 3. Sec. 942.02 F.S. 1955 ..... 4, 5, 6, 14, 23, 30, 31, 36, 38, 39, 43, 54, 55, 60, 63, 66, 67

Ch. 942, Fla. Stat. 1955 ..... 2, 3

Ch. 941, Fla. Stat. 1955 60

Sec. 88.061 Fla. Stat. 1957 60

Sub. Sec. (2) and (4) Sec. 942.02 FS 1955 ..... 63, 67

PAGE

DECLARATION OF RIGHTS, CONSTITUTION OF FLORIDA:

Sec. 9, Declaration of Rights, Constitution of Fla. 39, 40

Sec. 12, Decl. Rights Const. Fla. 31, 38, 40

Sec. 22, Decl. Rights Const. Fla. 31, 38

UNIFORM LAWS ANN:

Sec. 5, Uniform Reciprocal Enforcement of Support Act, 9C U.L.A. 23 60

9 U.L.A. Supp. 33 3

9 U.L.A. 258 60

CONSTITUTION OF UNITED STATES:

Sec. 2. Art. 4 Const. 6, 8, 9, 10, 15, 18, 21, 22, 55, 60, 61, 66

4th Amendment Const. 31

8th Amendment Const. 39

14th Amendment to Const. 6, 9, 38, 57, 65, 66, 67

Section 618-a, New York Code Criminal Procedure 2

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner

vs.

JOSEPH C. O'NEILL,

Respondent

CERTIORARI TO SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

The essential, material facts of the case at bar are these:

Joseph C. O'Neill, the general president of the Distillery, Rectifying, Wine and Allied Workers' International Union of America [A.F. of L.] (R: 7) was a citizen, and

resident of the state of Illinois, having his home and domicile in Elmwood Park, a suburb of Chicago, Cook County, Illinois, and never was a citizen of Florida nor a resident or citizen of New York. (R: 15) On or about April 23, 1956, Mr. O'Neill came to Florida for a temporary sojourn of a few days to attend a convention of the union of which he was president, which was in session in the City of Miami Beach, Florida, intending to remain in Florida only during the time said convention was in session, whereupon he intended to return to his home in Illinois. (R: 15-16) Mr. O'Neill had never been charged by indictment, or indeed, by any form of accusation, with violation of any of the Penal Laws of New York, or Florida, and on the day he came to Florida was not charged with violating any of the criminal or penal laws of New York, Florida or any other state. (R: 16-17) The State of New York had adopted the so-called "Uniform Law To Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," as Section 618-a of the New York Code of Criminal Procedure, and Florida had substantially adopted said Act as Ch. 942 Fla. Statutes 1955. When Mr. O'Neill arrived in Florida he was arrested and seized under an attachment (R: 9-10) issued by a Circuit Judge of Dade County, Florida, and ordered (R: 10-11) to show cause why he should not be returned to New York in the custody of officers of the State of New York, as a witness before a Grand Jury of New York County, New York. Upon Mr. O'Neill's response, and motion to quash (R: 13-18) the Circuit Judge entered an opinion and order (R: 20-32) in which he held said act unconstitutional, and discharged Mr. O'Neill from the rule to show cause. In re O'Neill, 9 Fla. Supp. 153. (Appendix A) The People

of the State of New York appealed (R: 32) and the Supreme Court of Florida affirmed [See: Application of the People of New York, etc. 100 So. 2d. 149, Appendix B] the lower court (R: 35-47) and this court granted certiorari.

This is the first case to reach this court which presents for consideration the constitutionality of the so-called "Uniform Law To Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," and we respectfully contend that the lower courts correctly held said act to be unconstitutional.

The History of the Act

The so-called "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings" (Ch. 942 Fla. Statutes 1955) was first adopted by the National Conference of Commissioners on Uniform State Laws and proposed for adoption by the several states in 1931, and has since been adopted with variations in its text by 42 States and the Territory of Puerto Rico. (See: 9 ULA Supp. 33).

During more than a quarter of a century since this Act was first proposed for adoption, and in spite of the fact that it has been adopted, at least in its broad outlines, by 42 States and the Territory of Puerto Rico, there had been only eleven (11) reported decisions construing or passing upon its various provisions until the case at bar arose, in April 1956, and its constitutionality had never been squarely considered or passed upon by any state court of last resort until the decision by the Supreme

Court of Florida in the case at bar, **APPLICATION OF PEOPLE OF STATE OF NEW YORK** (Fla.) 100 So 2d 149. Those eleven (11) decisions are listed in the Appendix to the nisi prius Court's opinion (See: 9 Fla. Supp. 164; R: 31-32) and since that time there have been no later decisions.

The Particular Provision of the Act Under Consideration Has Been Held Unconstitutional Twice—Never Held Constitutional.

Out of the eleven (11) cases, only three (3) involved the Constitutionality of the Act. **In re Allen** (1940) 49 Pa. D. & C. 631, **held the particular provisions of the Act here under consideration** (Sub. Sec. 3 of Sec. 942.02) **to be unconstitutional.** In **Re Cooper,** 127 N.J.L. 312, 22 A. 2d, 532, decided in 1941, held the Section authorizing issuance of a subpoena to the witness constitutional **as against the attack there made, but the particular provision of the Act here under consideration** (Sub. Sec. 3 of Sec. 942.02) **was not involved, and its constitutionality was not considered nor passed upon at all. In Re Saperstein,** 30 N. J. Super. 373, 104 A. 2d. 842, decided in 1954, the third case, **likewise did not involve the particular provision of the Act here under consideration (Sub. Sec. 3 of Sec. 942.02) and again the constitutionality of that particular provision of the Act was not before the Court, and was neither considered nor passed upon.** Thus, in the three (3) reported cases in which the constitutionality of the Act have been considered, **only one** (In re Allen, 49 Pa. D. & C. 631) **involved the constitutionality of Sub-Section 3 of Sec. 942.02,**

and that Court held it unconstitutional and void. The only other reported case in which the constitutionality of Sub. Sec. 3 of Sec. 942.02 has been considered and passed upon is that of the nisi prius court **(In re O'Neill, 9 Fla., Supp. 153)** from which the appeal was taken to the Supreme Court of Florida and the Supreme Court of Florida likewise held the particular provision here under consideration unconstitutional and void, **Application of People of State of New York, (Fla) 100 So 2d. 149,** and we contend, properly so.

In the case at bar, the Petitioner did not seek the mere issuance of a summons or witness subpoena directed to O'Neill, as authorized by Sub. Sec. 2 of Sec. 942.02, but instead, sought (R: 3) an order that he be "taken into immediate custody in Florida and delivered to an officer of the State of New York to assure his attendance" in New York, pursuant to Sub. Sec. 3 of Sec. 942.02, so that the case at bar turns upon the constitutionality of that particular provision of the Act. The question thus presented has never been considered or passed upon by the court of last resort of **any State** or by any Federal District or Appellate Court, or the Supreme Court of the United States, and except for **In re Allen, supra,** and the decision in this case **(In re O'Neill,** 9 Fla. Supp. 133, and **Application of People of State of New York,** supra), has never been passed upon at all. Even **Commonwealth v. Klaus, 130 NYS 713,** upon which Petitioner's counsel relied below, did not pass upon the particular provision (Sub. Sec. 3 of Sec. 942.02) here involved because, **first,** that case was decided in 1911, **twenty** years before the so-called "Uniform Act" was adopted by the National Conference of Commissioners on Uniform Laws, and, **second,** the New York Act there under consideration did not contain any

provision such as or even similar to sub—sec. 3 of Sec. 942.02, which provides that the witness "be taken into immediate custody and delivered to an officer of the requesting State", but even so, there was a strong dissenting opinion in **Commonwealth v. Klaus**, supra, which casts grave doubt as to the authority of that decision.

In short: The question presented in this case is one of first impression in this Court, and the only reported decisions (**In re Allen**, supra, and **In re O'Neill, 9 Fla. Supp. 153**, and **Application of People of State of New York**, 100 So 2d. 149) have held the particular provision (Sub. Sec. 3 of Sec. 942.02) here in question to be unconstitutional, and void—no Court has ever held it constitutional.

The Challenged Act Was Invalid as an Unconstitutional Restriction Upon the Right of Free Ingress and Egress from State to State.

Counsel for Petitioner apparently recognizes and concedes that the right of every American citizen to pass freely from State to State is an incident of NATIONAL citizenship, but argues that so long as all citizens are treated alike, the constitutional requirements are satisfied. In this contention we are confident that counsel errs: the "privileges and immunities of citizens of the several states" conferred, guaranteed, and protected against State action by Sec. 2, Article 4, and the 14th Amendment to the Federal Constitution are not limited to "equal protection of the laws". True, the 14th Amendment forbids any State to "deny to any person within its jurisdiction the equal protection of the laws", but that prohibition is in addition to the guarantee that "no State

shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" or "the several states". If a State does attempt to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States" or "the several states", such law would be unconstitutional and void, we submit, even though it applied alike to every citizen.

We do not contend that the right of free ingress and egress was ever intended to interfere with the orderly administration of justice within the territorial boundaries of the State, but we do contend that it does forbid Florida or any other State to deport a citizen to another State against his will without due process of law; it forbids kidnapping a citizen not charged with having committed a crime against the laws of Florida or any other State, and shipping him to another State as a prisoner, even if that kidnapping is attempted under the form or guise of law. The right of American citizens to pass freely from State to State is not an imaginary, or theoretical right, but a real, substantial and valuable privilege or right of national citizenship—it is one of the fundamental rights of **personal liberty**, protected by the Constitution of the United States:

> **"Definition and Nature of Personal Liberty.—** The right of personal liberty consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct without restraint except by due process of law, and in general, to live where and as he pleases."
> **16 CJS "CONSTITUTIONAL LAW"—987, 988.**

Among the "privileges and immunities" of citizens of the United States protected against State action by **Section 2, of Article 4 of the Constitution,** is the right to pass freely, from State to State.

Section 2 of Article 4 of the Constitution reads as follows:

> "**Section 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.
>
> A person charged in any State with treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.
>
> No person held to Service or Labour in one State, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

The right to extradite fugitives from justice and slaves was specifically granted by this Section, because the exercise of the power of extradition was a limitation upon the citizen's right to pass freely from State to State, and the same was true of slaves, because, when the Constitution was written, all states did not recognize

slavery, and it was necessary to protect the slave owner's right to recapture his property.

Section 1 of the 14th Amendment confirmed, and guaranteed the rights of citizenship declared by Section 2 of Article 4 of the Constitution:

> "**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The "privileges and immunities" of citizens of the United States protected against State action by **Sec. 2 of Art. 4 of the Constitution** included the right to pass freely from State to State:

> "The privileges and immunities so protected are the fundamental privileges of citizenship, **such as the right to pass freely from one state to another.**"
> **16A CJS "CONSTITUTIONAL LAW"—167, 168.**

and, the 14th Amendment confirmed the same "privilege" as an incident to National Citizenship:

> "The privileges and immunities protected by this clause of the Constitution are only those which

owe their existence to the Federal government, in its national character, its Constitution, or its laws, and not such rights as accrue from state citizenship. **These privileges and immunities include the right of ingress and egress from State to State and to the National capital."**
16A CJS "CONSTITUTIONAL LAW"—169, 170.

The right to pass freely from State to State as an incident of NATIONAL citizenship had its origin in Article IV of the Articles of Confederation, and the framers of the Constitution perpetuated the limitations imposed thereby upon the several States by Section 2 of Art. 4 of the Constitution in order to make NATIONAL CITIZENSHIP a reality, as is pointed out in an excellent Essay in **2 SELECTED ESSAYS ON CONSTITUTIONAL LAW, pages 429, 430,** where the learned author says:

"It has never been denied that the right to pass through or reside in any State is included among the "fundamental rights" secured against State action by Article IV, Section 2, of the Constitution, providing that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." It was expressly included in the catalogue of the interstate privileges and immunities, otherwise "fundamental rights" of state citizenship suggested by Mr. Justice Washington, in Carfield v. Coryell (4 Wash. C.C. 371), one of these rights being described by him as follows: "The right of a citizen of one State to pass through, or reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise." In later de-

cisions, it has been repeatedly recognized, as in Paul v. Virginia (8 Wall. 168, 180), in Ward v. Maryland (12 Wall. 418, 430) and in United States v. Wheeler (254 U.S. 281).

Article IV of the Articles of Confederation provided: "The better to secure and perpetuate mutual friendships and intercourse among the people of the different States in the Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; **and the people of each State shall have free ingress and egress to and from any other State.**"

Article IV, Section 2, of the Constitution was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations, a view which, says Mr. Chief Justice White in United States v. Wheeler, has been so conclusively settled as to leave no room for controversy.

* * * * To assume that a State "has power of depriving its own citizens of the right to reside peacefully therein and to free ingress and egress therefrom" is, as said by Chief Justice White in United States v. Wheeler (254 U.S. 281), to announce "that a State could without violating the fundamental limitations of the Constitution other than Article IV, Section 2, enact legislation incompatible with its existence as a free government and destructive of the funda-

mental rights of the citizen." This assumption cannot be entertained."

2 Selected Essays on Constitutional Law—429, 430.

In **Edwards v. California**, 314 U. S. 160, 62 S. Ct. 164, 86 L. Ed. 119, the Court had before it a Statute of California by which that State sought to exclude from its borders itinerant laborers commonly known as "Oakies", but the Court held the Statute unconstitutional as an infringement upon citizens' right to pass freely from State to State as citizens of the United States. Mr. Justice Douglas, speaking (Text: 86 L. Ed. 127-128) for the Court, said:

> "The right to move freely from State to State is an incident of NATIONAL citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against State interference. Mr. Justice Moody in Twining v. New Jersey, 211 U. S. 78, 97, 53 L. Ed. 97, 105, 29 S.Ct. 14, stated, "Privileges and Immunities of citizens of the United States * * * * are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." And he went on to state that one of those rights of NATIONAL citizenship was "the right to pass freely from State to State." Id., 211 U.S. p. 97, 53 L. Ed. 105, 24 S. Ct. 14. Now it is apparent that this right is not specifically granted by the Constitution. Yet before the Fourteenth Amendment it was recognized as a right fundamental to the national character of our Federal Government.

* * * So, when the Fourteenth Amendment was adopted in 1868, it had been squarely and authoritatively settled that the right to move freely from State to State was a right of NATIONAL citizenship. As such it was protected by the privileges and immunities clause of the Fourteenth Amendment. * * * * To be sure, there are expressions in the cases that this right of free movement of persons is an incident of STATE citizenship protected against discriminatory State action by Art. 4, Sec. 2 of the Constitution. * * * * The conclusion that the right of free movement is a right of NATIONAL citizenship stands on firm historical ground."

Mr. Justice Jackson in the same case (Text: 86 L. Ed. 130) said:

"This court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from State abridgement, to enter any State of the Union, either for temporary sojourn or for establishment of permanent residence therein and gaining resultant citizenship thereof. If National citizenship means less than this, it means nothing. * * * Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

The rights enjoyed by American citizens as incidents

of NATIONAL CITIZENSHIP apply to all citizens, wherever they may be:

> "The rights which a citizen enjoys by reason of his United States citizenship are protected against the action of his own state as well as against that of other states in which he may happen to be; the provision applies to all citizens of the United States, wherever domiciled and a state cannot abridge privileges of a citizen of the United States even though he is a resident of the State which undertakes to do so."
>
> **16A CJS "CONSTITUTIONAL LAW" — 172.**

When JOSEPH O'NEILL came to Florida in April, 1956, he was exercising one of the fundamental rights of personal liberty, secured to him by the Constitution of the United States, and in the exercise of that right, he was entitled to remain in Florida as long as he chose, and to depart, and return to his home in Illinois, or to go to any other destination whenever he chose to do so, and we submit that sub-sec. 3 of Sec. 942.02, Fla. Stat., insofar as it attempted to authorize any court of this State, upon the showing provided therein to order him "to be taken into immediate custody and delivered to an officer" of any other State, to be deported as a prisoner, against his will, to New York or any other state, was a clear infringement of his right to pass freely from State to State, and a serious impairment and abridgment of his fundamental right of personal liberty, guaranteed and protected by the Constitution of the United States.

The States of the Union Possess no Power, even to Surrender a Fugitive from Justice to a sister-state except such Power as is Conferred by Sec. 2 of Art. 4 of the U.S. Constitution, and have no Power Whatever to Surrender Any Citizen to a Sister State Unless That Power is Conferred by the U. S. Constitution.

Petitioner's counsel apparently contends that the several states of the Union have power under principles of comity, to surrender to a sister state any citizen within their borders merely upon request of such sister state, whether such person is charged with commission of a crime in the demanding sister state or not. In this, we submit that counsel is in error: we submit that it is settled beyond controversy, doubt, or even debate, that none of the States of the United States has or possesses any power such as independent nations possess, to surrender criminals to other nations as a matter of favor or comity, and that the several states have no power even to surrender to a sister state a fugitive from justice, except the power conferred by Section 2, of Art. 4 of the Constitution, and in the absence of a provision of the Federal Constitution authorizing a state to forcibly seize and arrest a citizen not charged with any crime, and to deliver him as a prisoner to officers of a demanding sister state, no such power exists, and hence, Sub. Sec. 3 of Sec. 942.02, Fla. Stat. is unconstitutional and void.

In **State v. Quigg**, 91 Fla. 197, 107 So. 409, Judge Strum, speaking (Text 411) for that Court said:

"Proceedings in extradition are sui generis, finding their origin and existence as between differ-

ent nations, wholly in treaty obligations, and as between the states of this Union wholly by virtue of the provisions of the Constitution of the United States and effectuating statutes. The Constitution of the United States, art. 4, sec. 2, provides:

> "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

* * * * *

Authority for interstate rendition of fugitives by extradition emanates solely from the power delegated to the federal government by the Constitution of the United States. In this state, such proceedings are wholly dependent upon the organic and statutory law just quoted. Legislation as to interstate rendition of fugitives being within the power of Congress, the federal law upon that subject is paramount to state Constitution and statutes. Ex parte Massee, 79 S.E. 97, 95 S.C. 315, 46 L.R.A. (N.S.) 781. When the executive warrant of rendition has been issued, the fugitive is then held solely upon that authority."

In **State v. Chase**, 91 Fla. 413, 107 So. 541, Mr. Justice Brown, speaking (Text 542-543) for that court plainly stated that "**Without these** (i.e., the Federal Constitutional

provision, and federal effectuating Statutes) **there would be no such thing as interstate extradition.**" He said:

> "As was said by this court, speaking through Mr. Justice Strum in the case of State ex rel. Stringer v. Quigg et al., 107 So. 409, decided at the present term:
>
> > "Proceedings in extradition are sui generis, finding their origin and existence, as between different nations, wholly in treaty obligations, and as between the states of this Union, wholly by virtue of the provisions of the Constitution of the United States and effectuating statutes."
>
> "The provision of our federal Constitution on this subject (Article 4, § 2) is in general terms, but the act of Congress (Section 5278, U.S. Rev. Stat.) (Section 10126, U.S. Comp. St. 1) is more specific. * * * * * * * * * * * * * * *
>
> "It must be conceded that this question of interstate extradition must be controlled by the provisions of the federal statute and the effectuating act of Congress above referred to. **Without these, there would be no such thing as "interstate extradition" and no harmony in the law governing the subject.** State ex rel. Stringer v. Quigg, supra; Kuney v. State (Fla.) 102 So. 547."

In 35 CJS "Extradition"—319, speaking of the basis for the power of one state to extradite a fugitive criminal from a sister state, the text says:

"It is not dependent on interstate comity, courtesy or contract."

And in 22 Am. Jur. "Extradition"—247, 248, the text states the same principle:

"When the present Constitution of the United States was adopted, it was provided that 'a person charged in any state with treason, felony or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the state having jurisdiction of the crime.' By this clause the power to regulate interstate extradition is delegated to the Federal Government, and in pursuance thereof laws of Congress have been passed specifying the judicial acts which are necessary to authorize a demand, * * * * . **Hence, as respects fugitives from justice** from one state to another, **their extradition is,** of course, **a matter which is controlled by the United States Constitution and is not dependent on comity or contract, and no person can be surrendered by one state to another unless the case falls within the provisions of the United States Constitution and the acts of Congress under it.**"

State and Federal Courts have repeatedly held that the states possess no power to surrender even criminal fugitives from justice upon principles of favor, comity or contract, and that the right and power to do so emanates solely from Section 2, Art. 4 of the Constitution of the United States and Federal statutes enacted pursuant

thereto, and that "without these, there would be no such thing as interstate extradition:" State v. Chase, supra.

Thus, in **People v. Hyatt**, 122 N. Y. 176, 46 N. E. 825, 60 L.R.A. 774, 92 Am. St. Rep. 706, cited by the Supreme Court of Florida in **ENNIST v. BADEN** (Fla) 28 So. 2d. 160, text 162, the Court held:

> "The extradition of a fugitive from justice from another State **depends on the provisions of the Constitution of the United States, and not on comity or contract.**"

Cullen, J., speaking (Text 826) for the Court, said:

> "Therefore, it necessarily follows that no person can or should be extradited from one State to another unless the case falls within the constitutional provision, and **that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the States.**"

Again, in **Ex parte Owen**, 10 Okla. Cr. 284, 136 Pac. 197, Ann. Cas. 1916-A-522, cited by the Florida Supreme Court in **State v. Chase**, 91 Fla. 413, 107 So. 541, the Court held:

> "The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the States of the Union; and no person can be surrendered by one State to another unless the case falls within the provisions of the Constitution and laws of the United States."

In **People ex rel Kopel v. Bingham**, 102 NYS 878, affirmed, 189 N.Y. 127, 81 NE 773, the Court said:

> "It seems to have been held by the Court of Appeals in People ex rel Corkran v. Hyatt, 172 N. Y. 176, 64 NE 825, 92 Am. St. Rep. 706, that no person can or should be extradited from one State to another unless the case falls within the Federal Constitution or Statutes and that **the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by States.**"

In **Ex parte Montgomery**, 244 Fed. 967, the Court said:

> "The right of extradition is not founded on any State Statute, comity or contract, but upon the Constitution and laws of the United States. Cockran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L.R.A. 774."

In **Ex parte Thompson**, 85 N. J. Eq. 221, 96 Atl. 102, Text 105, the Court said:

> "The right of a State to demand the extradition from another State of persons who have committed offenses against its laws, but who flee to such other state, is founded upon the Constitution of the United States, **and is not dependent on interstate comity, courtesy or contract.**"

Finally in **Ex parte Morgan**, 20 Fed. 298, the Court (Text 309) said:

> "Interstate extradition is regulated by law. No such power can ever be exercised by the Chief Executive of a State on the ground of comity. Rorer, Interstate Law, 225. Nor has it ever been, in this country, properly and legally exercised on such ground. * * * * Even before our present form of government came into existence, we find a number of the colonial plantations entering into a **compact** in the nature of a treaty for the extradition of fugitive criminals. If it could be done upon comity alone, why enter into a compact."

The authorities cited leave no doubt that "WITHOUT THESE (i.e., Sec. 2, of Art. 4 of the Federal Constitution, and federal effectuating states) **THERE WOULD BE NO SUCH THING AS INTERSTATE EXTRADITION,**" as the Florida court said in State v. Chase, supra; interstate extradition of fugitive criminals does not depend upon interstate comity, courtesy or contract, but solely upon the Constitution and laws of the United States, and that "the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by states of the Union." We respectfully, and confidently submit that if "there would be no such thing as interstate extradition" of criminals, were it not for Section 2 of Art. 4 of the Constitution and Federal Statutes enacted to implement that section, as the Florida court and the authorities generally hold, then it necessarily follows as night follows day that without a Federal Constitutional provision authorizing it, there can be "no such thing as interstate extradition" of witnesses. How can it be argued, or even contended, that altho fugitives from justice could not be extradited from state to state but for the power and authority to do so conferred

by Section 2, Art. 4 of the Federal Constitution and Federal Statutes enacted pursuant thereto, no such authority is required for the interstate extradition of witnesses? That citizens, not charged with commission of any crime, or even suspected of crime, can be seized and arrested and deported to another state as prisoners regardless of their personal liberty.

Counsel for Petitioner cites no authority for such a contention, we submit. **Kentucky v. Dennison,** 24 How. 66, 101—102 mistakenly relied upon by Counsel for Petitioner (Brief: pp. 21-22) pointed out very plainly that Section 2, Art. 4 of the Constitution authorizing interstate extradition of fugitives from justice was born out of the experience of the States under the Articles of Confederation that such a constitutional provision was **NECESSARY** to promote concord and harmony between the several states. If interstate "comity" had been sufficient, there would have been **NO NECESSITY** for Section 2, Art. 4 of the Constitution. We suggest that Petitioner's Counsel has completely misunderstood the effect of the decision in Kentucky v. Dennison, supra—it refutes appellant's argument that any power of interstate extradition exists even in the case of fugitive criminals, except such as is conferred by Section 2, Art. 4 of the Federal Constitution and enabling Federal Statutes.

The fact remains that none of the cases cited by Counsel for Petitioner have held that the several states possess any power to arrest and surrender to a sister state as a prisoner an American citizen not charged with or suspected of any crime—and we confidently predict that no case so holding can be found, while to the contrary the only cases (**In re Allen 49 Pa. D. & C. 631** and **In re O'Neill**

9 Fla Supp 153, and **Application of People of State of New York,** 100 So. 2d 149) which have considered and passed upon the point have held that no such power exists. In the absence of any provision of the Federal Constitution authorizing the interstate extradition of citizens not charged with the Commission of any crime in the demanding State, we submit that no such power exists, and sub-Section 3 of Sec. 942.02 F. S. 1955 is unconstitutional and void.

In the case of In **re Allen**, supra, speaking directly upon this point, the Court said:

> "**Second**: The Statute violates the Fourteenth Amendment to the Constitution of the United States, which provides, inter alia: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . " Article IV, Sec 2 of the Federal Constitution provides that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under the Fourteenth Amendment, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
>
> In some respects there is a difference between privileges and immunities referred to in the Fourteenth Amendment, which are those of citizens of the United States, and those referred to in Article IV of the Constitution, which are those of citizens of States, but with respect to the question before us they are substantially the same.

"In the case of Commonwealth of Massachusetts v. Klaus, 130 N. Y. Supp. 713, above referred to, the opinion filed is not a decision of a New York court of final appeals, but of the Appellate Division of the First Department of the New York Supreme Court. Although two judges in that court held the act constitutional, they seem to have been influenced in their decision by the thought that a number of other States had passed a similar law. The court said (p. 715):

"So if the Legislature of this State has in this instance passed an unconstitutional law, a number of other states have fallen into the same error. There can be no doubt that it is a duty which every man owes to society, to give evidence, when called upon to do so in a court of justice, with some few exceptions not relevant here."

Of course the fact that other States have adopted a similar act does not insure its constitutionality, nor is the fact that under proper circumstances a man is under duty to give testimony conclusive of the legal proposition that he may be compelled to leave his State and go to some other State to testify viva voce.

In his dissenting opinion in that case, Judge Laughlin answered the reasoning of the majority opinion conclusively when he said (P. 721):

"The police power of the state has no bearing on the question under consideration, for no

charge is made against Peale personally. The right of the State to summon before its courts, in the administration of the public justice of the state, persons found within the state, whether citizens, residents, or non-residents, is quite clear, as is also the right, in the interest of comity between states and nations, to provide for the taking of testimony within the state for use without the state, and these rights are exercised by all sovereign states and countries. The right, however, attempted to be conferred by this statute is quite different. It is to compel one to leave the state, whom the state could not prevent from entering, and then to punish him for his failure to do something beyond the jurisdiction of the state and of the judge whom it is attempted to authorize to inflict the punishment."

Judge Laughlin was of the opinion that the challenged Act "violates the provision of the Federal Constitution prohibiting the states from enacting any law abridging the privileges and immunities of citizens of the United States."

Judge Laughlin is not the only judge in New York who has held the challenged act unconstitutional. In In re Commonwealth of Pennsylvania, 90 N. Y. Supp. 808, Judge Blanchard denied a motion for a subpoena directing a citizen and resident of New York to appear and testify as a witness in a criminal case pending in a court of the State of Pennsylvania, saying:

"I can see no grounds upon which this Statute can be sustained, and none is urged by counsel for the moving party." Judge Blanchard was of opinion that it would deprive the proposed witness of his liberty without due process of law.

Third: The statute violates the clause in the Fourteenth Amendment to the Federal Constitution, which provides: "..... nor shall any State deprive any person of life, liberty, or property, without due process of law....."

Judge Laughlin in his dissenting opinion in Commonwealth of Massachusetts v. Klaus, supra, very well said (P. 270):

"The mere fact that the formality of appearing before a **judge** is required does not materially change the situation, for it has been attempted to confer authority on a judge of this state to issue a subpoena against a person produced before him within this state, commanding such person to leave the state and attend as a witness before a court in a state, within the territorial limits of which neither the Legislature nor the judge of this state has any jurisdiction. The attempt to confer authority on the judge to punish a failure to comply with such a subpoena as for a contempt of court is without authority. There can be no contempt of a court, except it be a failure to do something that the court has authority to require to be done, and it must be with respect to the administration of the law within this state."

* * * * * * * * *

"The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the Executive Authority of the State having Jurisdiction of the Crime"; is part of Section 2 of Article IV of the Federal Constitution and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States.

The authority for extradition is found in the Federal Constitution and the Federal statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. par. 662, Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to

enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another state is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment: Act of April 21, 1927, P. L. 327, sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this state."

We submit that Sub-Sec. 3 of Sec. 942.02 is clearly unconstitutional and void because in the absence of a provision of the Federal Constitution, extending interstate extradition to include mere witnesses, in addition to fugitives from justice, no power exists in the State of Florida or any other State to forcibly arrest and seize a citizen not charged with commission of any crime, and to deliver him as a prisoner into the immediate custody of officers of another State to be transported against his will, as a prisoner to a distant state.

Sub-Section 3 of Sec. 942.02 F.S. 1955 Violates the 14th Amendment to the Constitution of the United States in Denying Due Process of Law.

Sub-Section 3 of Section 942.02 F.S. 1955[1] provides

[1] *Sub-section 3, of Section 942.02* reads as follows:
"If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken in custody and delivered to an officer of the requesting state."

that the Judge of the Florida court upon "being satisfied of the desirability" of the immediate delivery of the witness into the custody of the officers of the requesting State, may "order that said witness be forthwith taken into custody and delivered to an officer of the requesting State."

Section 22 of the Declaration of Rights of the Constitution of Florida in the language of the **Fourth Amendment to the Constitution of the United States** provides that no warrants shall be issued, "but on probable cause" and "supported by oath or affirmation" while **Section 12 of the Declaration of Rights** and like its Federal counterpart the **14th Amendment** to the Constitution of the United States, both provide that "no person shall be * * * deprived of * * * liberty * * * without due process of law."

The particular provision **(Sub. Sec. 3 of Sec. 942.02)** under discussion does not require any statement under oath, of facts which would constitute "probable cause", for an "order that said witness be forthwith taken into immediate custody and delivered to an officer of the requesting State" to be transported out of Florida to a distant State as a prisoner in the custody of such officer. All that is required is that the judge of the requesting state "recommend" it, and that the judge of the Florida court be "satisfied of the desirability" of such an order. If such a provision complies with the ancient Constitutional guaranty which requires all warrants to be based upon affidavits showing "probable cause" for the prisoner's arrest and detention, or with the basic requirements of "due process of law" then human liberty hangs by a thread, and our boasted Constitutional guarantees are but a fool's delusion.

Take the case at bar as a perfect example:

The "Certificate" (R: 1-3) which is the basis for an "order that said witness be forthwith taken into custody and delivered to an officer of "The State of New York, opens with these words:

> "Upon reading the annexed affidavit of Francis X. Clark * * * I, Mitchell D. Schweitzer, Judge * * * do hereby certify * * *"

and said "certificate" closes (R: 3) with this "recommendation":

> "AND I DO HEREBY RECOMMEND that the said Joseph C. O'Neill be taken into immediate custody and delivered to an officer of the State of New York to assure his attendance in New York."

Thus, said "Certificate" (R: 1-3) recites that it is made **"upon reading the annexed affidavit** of Francis X. Clark" (R: 6-9) so we should examine that affidavit to see whether any "facts" are stated therein which would support such a "recommendation". The only possible basis for such a recommendation is this paragraph (R: 7) of Clark's affidavit:

> "The District Attorney's office has made efforts, all without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. Joseph C. O'Neill has consistently refused to appear to testify. His home and office are in Chicago, Illinois. Illinois has no re-

ciprocal witness statute. Therefore, the District Attorney's office has been powerless to compel Joseph C. O'Neill's attendance by court process."

and on the next page (R: 8) this lone sentence:

"The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily."

These bare conclusions are copied "parrot-like" into the "certificate", as will appear from an examination (R: 1-3) thereof. As we have pointed out—no evidence was offered at the hearing in the Circuit (risi prius) Court, so the "recommendation" of necessity rests upon the two paragraphs (R: 7 and 8) quoted above. Are those paragraphs a sufficient statement of FACTS to support an order that the witness be taken into "immediate custody" and be "delivered to officers" of the State of New York as a prisoner, to be transported from Florida to New York as a prisoner? We submit that it is not. In **CONRAD v. VAN BUREN, Circuit Judge,** 144 Mich. 492, 108 N.W. 347, Blair, J., speaking (text 348-349) of the FACTS necessary to support an order or writ for the arrest of a person said:

"The Constitution of the state (Article 6, § 26) provides that "no warrant to search any place or to seize any person or things shall issue without describing them nor without probable cause, supported by oath or affirmation." * * * * The facts to be stated in the affidavit must be given in the same way as on the stand, by a distinct averment of each fact upon knowledge, and the

facts must be such as in law tend to make out the cause of complaint. It is not for the party to draw his own inferences. He must state matters which would justify others in drawing them. The rules heretofore laid down in this court, have always required the facts themselves to appear upon knowledge. No other rule would preserve the constitutional right against warrants not based on probable cause, supported by oath or affirmation. Const. art. 6, § 26; Proctor v. Prout, 17 Mich. 473." In Sheridan v. Briggs, 53 Mich. 569, 19 N. W. 189, Mr. Justice Champlin, delivering the unanimous opinion of the court, says: "The principle deducible from these cases is that an affidavit which is used as the basis of a writ which will deprive a person of his liberty, must not only set forth the facts and the circumstances in detail, and not conclusions or inferences from facts, but they must be facts within the personal knowledge of the deponent. * * * * * If the deponent was called to the witness stand for the purpose of proving the falsity of the representations, it would not be competent for him to testify in the general, loose, and vague manner contained in his affidavit. Such testimony would not be admissible to establish the fact that the representations made were false. The affidavit upon which a person is held to bail must be of the same legal quality, as evidence, as would be required at the trial to establish the facts set up or relied on for cause of arrest. * * * * What would be quite sufficient in a pleading would, in most instances, be entirely insufficient in an affidavit to hold to bail. The

> reason is obvious. In pleading, the evidence is not required to be set forth. But no arrest can be made except upon sworn evidence of facts."

Let us test the statements contained in Clark's affidavit (R: 7-8) and in the Judge's "certificate" (R: 1-3) by this rule: The "statement" is:

> "The District Attorney's Office has made efforts, without success, to secure the attendance of Joseph C. O'Neill as a witness before the said Grand Jury. His home and office are in Chicago, Illinois. * * * The attendance of the said Joseph C. O'Neill before the said Grand Jury cannot be ensured voluntarily."

What "efforts" were made to secure O'Neill's attendance before the Grand Jury are not stated. Did anyone actually, personally ask him to go to New York to appear as a witness before the Grand Jury, and if so, did he refuse to do so? No such statement appears either in Clark's affidavit (R: 6-9) or the Judge's Certificate (R: 1-3). Did any one actually ask O'Neill to go to New York, and offer to pay him his reasonable traveling expenses, or any part thereof? Not according to Clark's affidavit. Did they ever issue a witness subpoena for O'Neill and try to serve it in New York? For all that is shown by Clark's affidavit (R: 6-9) no attempt has ever been made to serve him, nor is it stated that he had never been in New York; it is not even stated that O'Neill had NOT BEEN IN NEW YORK shortly before coming to Florida. The statement that "The District Attorney's office has made efforts without success to secure the attendance of Joseph C. O'Neill as a witness" is a bald, unsupported conclusion, without a

single FACT stated to support it, as is the statement that his attendance "cannot be ensured voluntarily." The State of New York sought an order under sub-section 3 of Sec. 942.02 to take O'Neill back to New York in chains, like a common criminal. Doubtless the District Attorney had in mind the "softening" effect of such a harrowing experience upon the witness—he would be much more "pliable" when they finally got him there. Hence it was "desirable" that he be taken into immediate custody and delivered to the officers of the State of New York as a prisoner to be returned as though he were an escaped felon. If this constitutes "probable cause" or "due process of law", then those terms are nothing but meaningless legalistic jargon.

Due Process requires that civil remedies for seizure of property be granted only upon affidavit stating facts—at least such showing should be required to authorize seizure of person.

The Statute (Sub. Sec 3 of Sec 942.02) nowhere requires any showing of "necessity" for an order to take the witness into immediate custody, for delivery to officers of the requesting State, to be transported to such state as a prisoner. The only requirement is that the judge find it to be "desirable"—that he be "satisfied of the desirability of such custody and delivery". "Desire" means "ordinarily, to wish for more or less earnestly". See: **Black's Law Dictionary** 566, or "to wish or long for; crave; want; also to need or require; to express a wish to obtain, ask for, request." See: **1 New Century Dict. 405.** "Desirable" is defined as: "Worthy to be desired; pleasing, excellent, or fine, n. one who or that which is desirable." In order to obtain a writ or order for the seizure of property

for an injunction or receiver, a showing of "necessity" is required. The grounds of attachment (Sec. 76.04 FS 1955) and garnishment (Sec. 77.03 FS 1955) are based upon a showing of "necessity" for the writ. Even a Writ of Replevin requires (Sec. 78.06 FS 1955) an affidavit stating FACTS in order to obtain the writ. An injunction can only be obtained upon a showing of "necessity", as this court held in **Crawford v. Bradford**, 23 Fla. 404, 2 So. 782: "Where no **necessity** is shown for the injunction * * * it should not be granted." In 28 **Am. Jur. "Injunctions" 217**, the rule prevailing in Florida and other American jurisdictions is well stated:

> "The extraordinary character of the injunctive remedy and the danger that its use in improper cases may result in serious loss or inconvenience to an innocent party require that the power to issue it should not be lightly indulged in, but should be exercised sparingly and cautiously, only after thoughtful deliberation, and **with a full conviction on the part of the Court of its URGENT NECESSITY.** In other words, the relief should be awarded only in clear cases, reasonably free from doubt, AND WHEN NECESSARY, to prevent great and irreparable injury." (Emphasis supplied)

Receivers cannot be appointed without a showing of "necessity": **Mirror Lake Co. v. Kirk Securities Corp.** 98 Fla. 946, 124 So. 722: **Apalachicola Northern R. Co. v. Sommers**, 79 Fla. 816, 85 So. 361; **Therrell v. State Life Ins. Co.** 107 Fla. 450, 145 So. 220. None of these remedies, involving seizure or interference with property are available upon a mere showing "of the desirability" of such process; a suitor must show a "necessity" before the

Courts will act even to infringe upon property rights, and we submit that "due process of law" under **Section 12 of the Declaration of Rights of the Constitution of Florida** and the **14th Amendment** requires at least as strong a showing to sustain an order or process for the arrest and imprisonment of an American citizen, especially if he is not charged with commission of any crime. **See: Conrad v. Van Buren, Circuit Judge,** supra.

> "The due process clause of the Constitution of the United States avouches the right to be free of arrest save on probable cause, and assures the right to be at liberty and to be imprisoned only for cause."
>
> **16A CJS "Constitutional Law"—634.**

We have shown that no FACTS were stated, either in the affidavit of Francis X. Clarke (R: 6-9), nor in the Certificate (R: 1-3), based thereon showing any need, necessity, cause, or probable cause for entry of an order for immediate custody, and we submit that the Statute (Sub-Sec. 3 of Sec. 942.02 FS) is unconstitutional, and violates Section 22 of the **Declaration of Rights of the Constitution of Florida,** because it does not require any showing of "probable cause" to be made upon "oath or affirmation", and for the same reason, violates the "due process" clause of **Section 12 of the Declaration of Rights** and the **14th Amendment** to the Constitution of the United States. The fundamental right of personal liberty, one of the greatest "human rights" guaranteed and protected by the Constitutions of the State and Nation, certainly should be as precious, and entitled to as much protection as the "property rights" protected by those same constitutional provisions.

The Statute Clearly Violates the 14th Amendment to the Constitution of the United States in failing to provide for bail.

The Statute (Sub-sec. 3 of Sec. 942.02 FS) is unconstitutional and void because it does not provide for nor permit bail, but instead attempts to provide for and authorize the entry of an order "that said witness be forthwith taken in custody and delivered to an officer of the requesting State", to be transported as a prisoner to a distant state with no provision for bail conditioned even upon the witness' appearance in the requesting State: We submit that this feature of the Act renders it a flagrant violation of Section 9 of the Declaration of Rights of the Constitution of Florida and the Eighth Amendment to the Constitution of the United States which guarantee the citizen's right to bail:

> "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great."

In **Ex parte McDaniel**, 86 Fla. 145, 97 So. 317, McDaniel had been convicted of assault with intent to commit murder in the second degree, and released on bond pending hearing on his motion for new trial. When his motion came on to be heard, however, he failed to appear, and his bond was forfeited, and he was arrested and confined to jail without bond. It was contended that because he had failed to appear, he was properly denied bail, but this court held that he was entitled to bail as a matter of right, and that a denial of bail "is a deprivation of liberty without due process of law:"

It may be that there are circumstances under which the right to bail in otherwise bailable causes would be forfeited by breach of prior bonds. 6 C.J. par. 180, p. 962; Lee's Case No. 8,150, 15 Fed. Cas. p. 136, 22 Leg. Int. 284, 6 Phila 96. But this is not a case in which the facts warrant a resort to this principle. There may have been grounds for punishment for contempt, but there was no such conduct upon the part of petitioner in the way of flagrant disregard of the court's authority or effort to evade its processes as to forfeit his constitutional right to bail during a recess of several weeks or for an indefinite period of the trial court."

In **Bozovichar v. State** (Ind.) 103 N.E. 2d. 680, the Supreme Court of Indiana said:

"The denial of the right to give bail where the proof of guilt is not evident or the presumption of guilt strong would be a deprivation of liberty without due process of law, in violation of the Constitution, which would call for prompt corrective action. Ex parte McDaniel, 1923, 86 Fla. 145 97 So. 317."

In 6 Am. Jur. "Bail and Recognizance"—66, it is said:

"The practical effect of constitutional and statutory provisions of various states is to make the allowance of bail mandatory in non capital cases. Indeed, a grant of bail cannot be prohibited by the legislature when the fundamental law contains the customary guaranty of the right to bail."

6 Am. Jur. "Bail and Recognizance"—66.

As we have pointed out earlier [this Brief, pages: 4-6] neither the Cooper case (**In re: Cooper**, supra) nor the Saperstein case (**In re Saperstein**, supra) involved **Sub-Sec. 3 of Section 942.02 FS**, and the constitutionality of the particular provision of the Act here under consideration was not before the Court, and was not considered or decided, and we invite the Court to examine those opinions, from which it will be clear that neither sustains the Constitutionality of **Sub-Section 3 of Sec. 942.02 FS.**

The sum and substance of the argument of Appellant's counsel seems to be that the supposed necessity for securing witnesses in criminal cases in other states is so great as to justify the courts in over-riding and ignoring all safe-guards and guarantees in favor of citizens granted both by State and Federal Constitutions—in other words: the end justifies the means, no matter what becomes of the prized liberties of American citizens. We cannot, we refuse to believe that this argument is sound. In the interest of crime-prevention, it might be "desirable" to abolish the Union of States, and in its place erect a single state, extending from the Atlantic to the Pacific, and from Canada to the Gulf of Mexico, with no boundaries to limit or impede process of courts, but no such revolution has occurred, and, as long as the United States and the several states exist as we have known them, they must exist subject to the limitations and restrictions imposed by the Constitution of the United States, and the Constitutions of the several states, which we submit forbid any such strong-arm procedure as is attempted to be provided by **Sub-Section 3 of Sec. 942.02 FS 1955.**

The State of Florida Cannot Constitutionally Enact a Statute Authorizing Issuance of Criminal Process Beyond the Limits of this State.

We submit that **Section 942.02 F.S. 1955** does in law and fact constitute an attempt to confer upon the courts of Florida power to issue process running beyond the territorial limits of this State. The plain, simple unambiguous language of **Sub-sec. 2 of Section 942.02 Fla. Statutes** says:

> "If at a hearing the judge determines that the witness is material and necessary * * * **he shall issue a summons * * * directing the witness to attend and testify in the court * * *** where a grand jury investigation has commenced * * * **at a time and place specified in the summons.**"

If this is not an attempt to authorize the issuance of a witness subpoena running beyond the limits of this State, then words are meaningless.

Sub-Sec. 3 of Sec. 942.02 constitutes an equally bold attempt to authorize the courts of this state to issue process in the form of an order "that said witness beforthwith taken into custody and delivered to an officer of the requesting State"—in plain words, it attempts to authorize the courts of Florida to issue a WARRANT, conferring legal authority upon an officer of another state to hold a citizen, not charged with any crime, in his custody as a prisoner during a journey beyond the limits of the State of Florida until the officer arrives in the state from whence he comes with his unwilling pris-

oner. If these two sub-sections do not attempt to confer upon the courts of Florida power to issue process running beyond the limits of this State, then we frankly confess that we are incapable of understanding plain, unambiguous English language.

We submit that this proposition is so clear, and beyond the realm of debate that it should not be necessary to cite authority to sustain it.

> "No sovereignty can extend the process of its courts beyond its territorial limits; nor can a tribunal established by a state extend its process beyond the territorial limits of the State."
>
> **72 CJS "Process"—997**
>
> **Note 75, citing inter alia:**
>
> **Beckwith v. Bailey**
>
> **119 Fla. 316, 161 So. 576.**

And:

> "A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued."
>
> **3 Fla. Jur. "Arrest"—55,**
>
> **Note 5, citing:**
>
> **Passet v. Chase, 91 Fla. 522, 107 So. 689,**
>
> **and also citing:**
>
> **Opinions of Attorney General**
>
> **1951 - 1952, page 764.**

The Biennial Report of Hon. Richard W. Ervin, as Attorney General of Florida for 1951-1952, on page 764 says:

> Questions: 1 Does a Florida municipal police officer have authority to serve a warrant in Florida which is issued in another State?
>
> **Answer—As to Question One:**
>
> "An Arrest Warrant issued in one State may not be executed in another State, for **it has no validity beyond the boundaries of the State under whose authority it was issued.** (4 Am. Jur. 14, Arrest, Par. 19; Passett v. Chase, 107 So. 689). This rule applies to all kinds of arrest warrants, including bench warrants."

Pennoyer v. Neff, 95 U.S. 714, has been the leading authority for the proposition that process cannot run beyond State territorial limits:

> "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside its territory except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story "is a mere nullity,

and incapable of binding such persons or property in any other tribunals." Story, Confl. L., Sec. 539."

Field, J., in Pennoyer v. Neff,
95 U. S. 714,
24 L. Ed. 565, text, 568-569.

In 4 Am. Jur. "Arrest", Sec. 19, page 14, cited by the learned Attorney General in his opinion, we find this:

"§ 19. **Execution of Warrant in State Other than That in Which It was Issued.**—A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. A warrant may confer authority on a police officer or private individual to make an arrest anywhere within the boundaries of a state, but it has no extraterritorial effect of any kind, and will not justify an arrest made outside the limits of the state."

In **Beckwith v. Bailey**, 119 Fla. 316, 161 So. 576, Mr. Justice Davis, speaking for this court (Text 581) said:

"In the present case no personal service was had upon Bailey sufficient to invoke the application of the full-faith and credit clause of the federal Constitution and the laws of Congress enacted thereunder, because no state can issue process to be made effective beyond its own borders, although such process be sent beyond the borders of the state of forum and there served."

In **Passet v. Chase**, 91 Fla. 522, 107 So. 689, Passett had been arrested and jailed by Chase, as Sheriff of Dade County acting under a bench warrant issued by and out of the Supreme Court of the District of Columbia; he applied for a writ of habeas corpus, and the Circuit Judge denied his motion for discharge, and remanded him to the custody of the Sheriff. This Court **reversed** the Circuit Court, and ordered Passett's discharge from custody. Brown, C. J., speaking for this Court (Text 691-692) said:

> "It is plain that this bench warrant and indictment only authorized an arrest by a United States marshal or his deputy within the territorial jurisdiction of the court issuing it, as indicated by its language; that is, within the District of Columbia. It is too well settled to requirt citation of authority that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. * * * This question was decided by the Court of Appeals of the District of Columbia, in the case of Palmer v. Thompson, 20 App. D.C. 273. * * *

This was a habeas corpus case appealed from the Supreme Court of the District of Columbia discharging Thompson from the custody of the United States marshal, and the decision of the lower court was affirmed. In the body of the Opinion it is said:

> "But, in the absence of specific statutory enactment to that effect, it is undoubtedly the

general rule of law that no court has authority or jurisdiction beyond the territorial limits of the district for which it has been established, notwithstanding that it may be, as in the present case, only one of numerous similar courts of the same sovereignty. No court can by its writ impose a duty upon an officer outside of those limits. It may well be that, under exceptional circumstances, it may direct its own officer for some specific purpose to go outside of its own territorial limits; but we cannot understand how it can assume any authority under the general powers vested in it to issue its precept to the officer of another jurisdiction, when it has no power to enforce the performance of the duty. We do not mean to be understood as saying that Congress may not grant this authority. * * *"

It therefore appears that the warrant with indictment attached, issuing from the Supreme Court of the District of Columbia not only conferred no authority upon the sheriff of Dade County, Fla. to arrest the plaintiff in error, but it conferred no such authority upon the United States Marshal for that federal district had he attempted to make such arrest thereunder.

It would appear from the foregoing that the plaintiff in error was unlawfully restrained of his liberty, and that he was clearly entitled to be discharged from custody, provided the said court before which the habeas corpus proceedings were brought had jurisdiction to that end."

In **Kirkes v. Askew, Sheriff,** 32 F. Supp. 802, Kirkes sued the Sheriff, Askew, an officer of the State of Oklahoma, for damages for plaintiff's detention in an Arizona jail. Kirkes had been charged with a crime in Oklahoma, and a warrant was issued in Oklahoma for his arrest. Askew, in Oklahoma, by telegram, requested the Sheriff of Yuma County, Arizona to arrest and hold plaintiff, which he did. Plaintiff agreed to waive extradition, and defendant Sheriff proceeded with the Oklahoma warrant to Yuma County, Arizona, where he found plaintiff in jail waiting for him, and "thereupon defendant Sheriff formally executed said warrant." The Court said:

> "The law of Oklahoma and the law generally is that a warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. (Citing cases, including Passett v. Chase, Sheriff, 91 Fla. 522, 107 So. 689) the Sheriff of Latimer County, (Oklahoma) when he attempted to execute the warrant by arresting plaintiff in Arizona, was acting beyond any authority conferred upon him by said warrant, and beyond the scope of any authority conferred upon him as a sheriff under the laws of Oklahoma. He had no authority to direct that the plaintiff be detained in jail while he, the Sheriff, went to San Francisco. * * * * The fact that the County paid the Sheriff for the trip to Arizona did not, and could not, add to the authority of the sheriff and authorize him to execute a criminal warrant outside the State of Oklahoma. If the allegation of the complaint * * * * may be construed to mean that the County

Attorney of Latimer County ordered the Sheriff to go to Arizona, the same conclusion must be reached, **for the State of Oklahoma does not purport to authorize the County Attorney to go to another State, arrest a person and return him to the State. IF THE STATUTE PURPORTED SO TO DO, IT WOULD IN OUR OPINION BE INVALID.**" (Emphasis ours)

In **McLean v. State of Mississippi** (CCA-5) 96 F. 2d. 741, 119 ALR 670, cert. den 305 U.S. 623, 59 S. Ct. 84, 83 L. Ed. 399, Rufus Lee Roy sued McLean, as Sheriff of Bolivar County, Miss., on his official bond. An atrocious murder had been committed in Bolivar County, Miss., and Roy was suspected of the crime. He was arrested in Shreveport, La., and waived extradition, and McLean, the Sheriff, and two deputies went to Louisiana with the prosecuting attorney to return him to Mississippi. McLean, the Sheriff, took Roy to Memphis, Tenn., where he was held in jail for ten days and released because the true murderer was discovered. Roy claimed that brutal "third degree" practices were inflicted upon him while he was in jail in Memphis, and, for the injuries and damage thus sustained, he sued the Sheriff on his bond. The case turned upon whether the Sheriff was acting as Sheriff under color of his office in taking Roy to Memphis, Tennessee or not, and the Court held that he had no status as an officer outside the State of Mississippi, and that whatever he did outside of Mississippi was done as a private person, and not as an officer of the law. SIBLEY, Circuit Judge, speaking (Text 745) for the Court said:

"What is involved is that Roy, having supposedly

committed a crime in Mississippi, had escaped into Louisiana and was to be taken back to Mississippi. That has been provided for by the Constitution and Laws of the United States. The extradition Statute 18 USCA, Sec. 662, 663, gives State Sheriffs no duty or function. The Governors of the two states handle the matter, and the prisoner is to be delivered to and returned by a specially appointed agent and not by the State Sheriff or a United States Marshal. * * * * Even though one who is a sheriff should be appointed such agent, he acts not as Sheriff under his bond, but as special agent to extradite at least until he has the prisoner in his custody in his own county. When in this case, McLean, extradition having been waived, went to Louisiana and took charge of Roy, he did not, because he could not, exert the office of Sheriff of Bolivar County, Miss. **In Louisiana and again in Tennessee he did not, because he could not, act either virtute or colore officii. He had neither office nor color of office as a Mississippi Sheriff while in another State, where Mississippi laws were not in force. * * * IN SUCH OTHER STATE HE IS ONLY A PRIVATE CITIZEN."** (Emphasis ours)

In **Mandeville v. Guernsey** 51 Barb. (N.Y.) 99, affirmed by the New York Court of Appeals in 50 N. Y. 669, it was held:

"The official character of an individual as sheriff in another state, and a bench warrant issued to him as such sheriff upon an indictment found in that state will not authorize him to arrest the

person named therein within this state and carry him beyond its boundaries. In respect to those acts, he is to be treated as a private person acting without legal process.

An arrest of a person within this state, by a private individual, without warrant, made for the purpose of forcibly abducting the arrested person from the State, and followed immediately by such abduction, cannot be justified. Such seizure and abduction, of themselves, constitute a criminal offense of high grade, both at common law and by statute."

In **Collier v. Vaccaro,** (CCA-4) 51 F. 2d. 17, Vaccaro was arrested on a charge of kidnapping, because, after he had lawfully arrested one Price, in Canada, he had forcibly brought him across the border into the United States. The Court, on habeas Corpus held that he was guilty of kidnapping. Circuit Judge PARKER speaking (Text 19-20) for the Court said:

"An unlawful arrest is merely an offense against the peace and dignity of the state; an unlawful carrying of a citizen beyond its boundaries to be dealt with by the laws of another State is a violation of the sovereignty of the former. And it is no defense to the crime of kidnapping that an accused may have thought that he had a right to arrest and carry the person arrested out of the country, or that he did not intend to violate the law. The gist of the offense is the forcible carrying out of the State; and where this intention is shown to have existed it is immaterial that ac-

cused may have thought that he was acting within the law. Ignorantia legis neminem excusat. So far as it (the order below) released him under the commitment on the charge of kidnapping, it will be reversed."

Suppose officers of the State of New York came to Florida armed with an attachment or witness subpoena issued out of the Court of New York, and attempted to execute the attachment, by taking O'Neill into their custody, in Florida: **Passett v. Chase,** supra, settled the proposition that their attachment would be null, void, and ineffectual for ~~any~~ purpose in Florida, and that they would have no power as officers of the law in Florida, and no power to execute or serve any process. If officers of New York attempted to serve even a witness subpoena upon O'Neill in Florida, **Passett v. Chase,** and **Beckwith v. Bailey,** supra, leave no doubt that they would have no power as officers to do so and their subpoena, as process would be void and worthless.

Suppose officers of the State of New York came to Florida to transport O'Neill back to Florida pursuant to an order pursuant to **Sub. Sec. 3 of Sec. 942.02 FS 1955**— whence would they derive any status as officers in Florida? According to **Passett v. Chase,** supra, they would lack any power or authority as officers of the law. According to **McLean v. Mississippi,** they would have "neither office nor color of office as a (New York) Sheriff while in another state, where (New York) laws were not in force. * * * In such other state (Florida) they would be only a private citizen." Even in inter-state extradition cases, as the Court pointed out in **McLean v. Mississippi,** a sheriff or officer of the demanding state HAS NO

POWER, AUTHORITY OR STATUS as a Sheriff or officer of the State from which he came, but only as an Agent specially appointed in the Extradition proceeding—in other words:

Section 2 of Article 4 of the Federal Constitution, and Federal enabling Statutes enacted thereunder, give power and authority in interstate extradition proceedings which otherwise is wholly lacking. In the hypothetical case we have been considering however, there is no Federal Constitutional provision to confer power and authority upon any officer from a demanding state—and without it, the most exalted officer the State of New York could send would be a mere private citizen with no power to arrest or hold O'Neill in his custody, unless such power or authority could be conferred by an order entered by a Florida Court pursuant to **Sub-sec. 3 of Sec. 942.02 FS 1955.** But does the Circuit Court of Dade County have any power or jurisdiction to appoint a private citizen of New York temporarily in this State as a transient, as an officer of the State of Florida? We know of no such authority, and confidently submit that none exists. Therefore, there is no officer of the law into whose custody O'Neill could be placed. Suppose, however, that O'Neill was delivered into the custody of such an "officer" and they started back to New York, and at Atlanta, Georgia, or any place between the Florida and New York line, O'Neill walked away from his captor? The order of the Florida court would no longer be valid as authority to hold him in custody, or recapture him, and any supposed power or authority conferred upon an "officer" of New York would have evaporated at the Florida State line. What would be left? Nothing but plain, unabashed, bald-faced kidnapping under the guise of a legal proceeding.

PETITIONER'S BRIEF

The so-called "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings," attempts to authorize the seizure and arrest of a citizen not charged, or even suspected of having committed a crime against the laws of any state, and to authorize his deportation as a prisoner in the custody of officers of another state, there to be detained or imprisoned if he cannot make bond until the prosecuting officers decide they have no further need of him. For example, suppose a citizen of Maine came to Florida for a short visit. While in Florida, over a thousand miles from home, he may be seized and arrested upon demand of a court of the State of Washington, although he has committed no crime in the State of Washington nor any other state. Under the provisions of the Act under consideration he may, if a judge in the State of Washington so recommends, "be taken into immediate custody and delivered to an officer" of the State of Washington to be deported across the continent as a prisoner without bail by such route or method of travel as his captors may select. Once in the State of Washington he may be held there for days, weeks or even months: no limit is specified in the Act, which only requires that the judge in the demanding state certify that "his presence will be required for a specified number of days" without placing any limit thereon. Once in the State of Washington it needs no gift of prophecy to forecast that unless the hapless citizen of Maine, a "stranger in a strange land," can procure bail, that he will be imprisoned "to assure his attendance" as a witness when desired. When the hapless citizen is finally released, and discharged from further attendance as a witness, what is to happen to him? The Act is silent—

it takes no further interest in him. It contains no provision providing the hapless citizen with subsistence and transportation back to Maine, or to Florida. It is conceivable that if the officials of the State of Washington were disappointed in his testimony he might be left to get back to his home in Maine the best way he could. Indeed since the Act does not require that he be furnished either subsitence or transportation back to Florida, or to his home in Maine, that no state funds would be available for that purpose. We call attention to the fact that the only provision for the payment of witness fees or mileage is in cases in which a witness is merely "summoned" and not in cases in which the witness is taken into custody and forcibly deported as a prisoner. In using the State of Washington in our illustration, we have no intention of disparaging that great western state: The illustration is equally applicable to every one of the 43 states, including Florida, which have adopted this Act. Unfortunately, there are many citizens who are utterly unable financially to defend themselves from the harsh and arbitrary operation of said Act as is Respondent, Joseph C. O'Neill. We suspect that most, if not all of those who have been subjected to its operation have had to submit silently, and this undoubtedly accounts for the dearth of adjudicated cases considering its constitutional validity.

Petitioner's Arguments Overlook The Effect Of The 14th Amendment.

That part of Section 1 of the Fourteenth Amendment material to a consideration of the arguments advanced by Petitioner reads as follows:

"Section 1.—All persons born or naturalized

> **in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.** * * * * *

In **COLGATE v. HARVEY, 296 U.S. 404, 80 L. Ed. 299, 56 S. Ct. 252, 102 A.L.R. 54,** Mr. Justice Sutherland, discussing national citizenship as recognized by Section 1 of the Fourteenth Amendment, and the privileges and immunities thereof protected against state abridgment by that Section said:

> "Thus, the dual character of our citizenship is made plainly apparent That is to say, a citizen of the United States is **ipso factor** and at the same time a citizen of the state in which he resides. And while the Fourteenth Amendment does not **create** a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship. * * * * * *
>
> The result is that whatever latitude may be thought to exist in respect of state power under the Fourth Article, a state cannot, under the Fourteenth Amendment, abridge the privileges of a citizen of the United States, albeit he is at the same time a resident of the state which undertakes to do so. This is pointed out by Mr. Justice Bradley in the Slaughter House Case (C.C.) 1 Woods, 21, 28, Fed. Cas. No. 8,408:

"The 'privileges and immunities' secured by the original constitution were only such as each state gave to its own citizens. Each was prohibited from discriminating in favor of its own citizens and against citizens of other states. **But the Fourteenth Amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges: but it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.**

* * * *

"Under the Fourteenth Amendment, therefore, the simple inquiry is **whether the privilege claimed is one which arises in virtue of national citizenship. If the privilege be of that character, no state can abridge it.** No attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects. **Among those privileges, however, undoubtedly is the right to pass freely from one state to another.** Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 745, supra; Williams v. Fears, 179 U.S. 270, 274, 45 L. Ed. 186, 188, 21 S. Ct. 128. **And that privilege, obviously, is as immune from abridgment by the state from which the citizen departs as it is from abridgement by the state which he seeks to enter.** This results from the essential character of national citizenship."

Thus, in the case at bar, according to Colgate v. Harvey, supra, the simple inquiry is this: Is the privilege

claimed by Joseph O'Neill one which arises in virtue of national citizenship, and if so, has that privilege been abridged by Section 942.02 Fla Statutes 1955? Counsel for Petitioner concedes both points, and, as Justice Sutherland said: "If the privilege be of that character, no state can abridge it."

Petitioner's argument does not take into consideration that the Act [Sec. 942.02 FS 1955] in question attempts to authorize the Interstate extradition of persons neither charged with nor suspected of having committed any crime. A reading of many cases from various jurisdictions, leads to the conclusion that if the States have any power to legislate at all on the subject of interstate extradition, their authority extends only to the enactment of laws in aid of the power conferred by Art. 4, Sec. 2 of the Constitution and the Acts of Congress passed to make said Constitutional power effective. Such laws as have been enacted deal with persons charged with crime, and hence are materially different in that respect from the Act [Sec. 942.02 FS 1955] here under consideration. For example, counsel refers to the Uniform Criminal Extradition Act [9 U.L.A. 258; Ch. 941 FS 1955] and Section 5 of the Uniform Reciprocal Enforcement of Support Act [9C U.L.A. 23; Sec. 88.061 FS 1957] both of which deal only with persons **charged with crime,** and are superfluous and unnecessary in view of the ample provisions of the Federal Statutes governing Interstate extradition of persons charged with treason, felony, or other crimes, and if such laws have any practical value whatever, it is only insofar as they aid or support the Federal Statutes.

Kentucky v. Dennison, 24 How. 66, 65 U.S. 717, does not decide or hold that the states possess any power, re-

served or otherwise, to seize and arrest a citizen of the United States not charged with treason, felony or other crime, and to forcibly deport him to another state as a prisoner: no such question was involved in that case. On the contrary, that case clearly decides that the right of one state to demand the rendition of a fugitive from justice, charged with the commission of treason, felony or other crime in the demanding state, and the obligation of the asylum State to honor that demand exists solely by virtue of **Art. 4, Sec. 2** of the Constitution:

> "The constitution having established the right on the one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. * * * * And, acting upon this authority, and the clause of the Constitution which is the subject of this controversy, Congress passed the Act of 1793, February 12th (1 Stat. at L. 302) which, as far as it relates to this subject, is in the following words: * * * *

The Court then quotes sections 1 and 2 of the Act of 1793 [Now: Title 18, Sec. 3182 U.S.C.A.]. In **UNITED STATES v. O'BRIEN, Sheriff,** (C.C.A. 7) **138 F. 2d 217,** the Court, which included Mr. Justice MINTON, then a Circuit Judge, said:

> "Unquestionably, the source of all authority for the extradition of an alleged fugitive from justice from one state to another is found in Art. IV, Sec. 2, clause 2 of the Constitution of the United States, which is not self-executing, but is made effective by Section 5278 of the Revised Statutes, 18 U.S.C.A. § 662 * * * * *"

We respectfully suggest, and submit, in the words of the Court in the case of **In RE ALLEN, 49 Pa. D. & C. 631, text, 643:**

> "The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. Par. 662. Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one state to another, a fortiori, an act for the compulsory transfer of an innocent person from one state to another for the purpose of giving viva voce testimony should have like express constitutional authority, * * * * * *"

A claim that State legislation has been enacted under the police power of the State cannot justify a disregard of constitutional inhibitions, as Mr. Justice McReynolds pointed out in **PANHANDLE EASTERN P. LINE v. STATE HIGHWAY COMM'N, 294 U.S. 613, 55 S. Ct. 563:**

> "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * * * The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. * * * * Under it there is no unrestricted authority to accomplish whatever the public may presently desire."

In **EDWARDS v. CALIFORNIA**, supra, the State of California contended, with far better logical support than can be advanced in the case at bar, that the Act there under consideration had been enacted in the exercise of the State's police power, but that contention did not avail to sustain the Act, which this Court held unconstitutional.

The Act [Sec. 942.02 FS 1955]here under consideration had never been considered by the Court of last resort of any state, nor by this Court until the unanimous decision of the Supreme Court of Florida. **[App. of People of New York, etc. v. O'Neill, 100 So. 2d, 149]** here for review, and we respectfully submit that for the reasons stated by the learned Court below, and those we have advanced, the conclusion is irresistable that said Act is unconstitutional and the judgment under review should be affirmed.

The Provision Attempting to Authorize Issuance of Process Running Beyond State Boundaries Is Likewise Unconstitutional and Void.

The Act [Sec. 942.02 FS 1955] under consideration also attempts to provide for and authorize the issuance of a witness subpoen arunning beyond the boundaries of the state where issued, and this provision [Sec. 942.02, subsections (2) and (4) FS 1955] the lower Court also held unconstitutional;

> "Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the

judge held the whole act unconstitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

"It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general rule we understand is true. Passett v. Chase, 91 Fla. 552, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565.

* * * *

"We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by court properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what could would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Con-

ceivably his failure would be contemptuous of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially."

Petitioner's counsel seem to abandon any attempt to sustain the constitutionality of this aspect of said Act. [See: Petitioner's Brief, pp. 26-27]. We have already discussed this feature of said Act [**See: pp. 44-55 of this Brief**] and, without repeating our argument, we respectfully refer the Court thereto. We particularly rely upon **Pennoyer v. Neff, 95 U.S. 714; Kirkes v. Askew, 32 F. Supp. 802;** and **McLean v. Mississippi (CCA-5) 96 F. 2d. 741, 119 A.L.R. 670,** cert. den. **305 U.S. 623, 59 S.Ct. 84, 83 L. Ed. 399.** We respectfully submit that the unconstitutionality of this feature of said Act is not debatable.

CONCLUSION

It is conceded that one of the privileges and immunities of Joseph C. O'Neill by virtue of being a citizen of the United States is the right to pass freely from State to State. It was settled in COLGATE v. HARVEY, supra, that the Fourteenth Amendment requires, not merely "equality of privileges; but it demands that the privileges of all citizens shall be absolutely unabridged, unimpaired," and the right to pass freely from state to state being a privilege of national citizenship "no State can abridge it." As the Supreme Court of Florida said:

"A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who will conduct him to New York. His privilege of staying or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment."

Application of PEOPLE OF NEW YORK v. O'NEILL (Fla) 101 So. 2d. 149, Text 155.

We respectfully submit that the Act [Sec. 942.02 F.S. 1955] in question is clearly unconstitutional and void, because:

FIRST: It abridges the privilege of citizens of the United States, existing by virtue of the Fourteenth Amendment, to pass freely from state to state.

SECOND: The power of Inter-state rendition emanates solely from the power delegated to the Federal Government by **Art. 4, Sec. 2** of the Constitution, which authorizes interstate rendition of persons charged with "treason, felony, or other crimes", and does not authorize the seizure and arrest and deportation of citizens not charged with crimes against any state, and absent such authority conferred by the Constitution of the United States, no such power exists on the part of the States.

THIRD: The Act [Sec. 942.02 FS 1955] making no provision for bail, and lacking any requirement that facts be stated to support the application, for seizure and arrest, same deprives citizens of their liberty without due process of law in contravention of the Fourteenth Amendment.

FOURTH: Sub-Sections (2) and (4) of Sec. 942.02 FS 1955, are unconstitutional and void insofar as same attempt to authorize issuance of process, a witness subpoena, running beyond the boundaries of a state.

We therefore respectfully submit that the opinion (R: 35-47) and judgment (R: 47) of the Supreme Court of Florida here under review should be affirmed.

L. J. CUSHMAN
Counsel for Respondent
JOSEPH C. O'NEILL.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the_____day of October, 1958, I mailed a printed copy of the foregoing Brief of Respondent to the following: **Hon. Richard W. Ervin, Attorney General of Florida,** The Capitol, Tallahassee, Florida; **Hon. Reeves Bowen, Assistant Attorney General of Florida,** The Capitol, Tallahassee, Florida; **Hon. Frank S. Hogan, District Attornep, New York County,** New York 13, New York; **Hon. John Anderson, Jr., Attorney General of Kansas,** and **The National Conference of Commissioners on Uniform State Laws,** by mailing same to **Hon. James C. Dezendorf, as President,** Pacific Building, Portland 4, Oregon, and **Hon. Louis A. Kohn, as Counsel,** 231 South La Salle Street, Chicago 4, Illinois.

Dated at Miami, Florida, this_____ day of October, 1958.

L. J. CUSHMAN
Counsel.

In re O'NEILL.

9 Fla. Supp. 153

Circuit Court, Dade County.

July 20, 1956.

Under provisions of a "uniform law" for Interstate Extradition of Witnesses, chapter 942, Florida Statutes 1955, the state of New York filed an application for an order requiring O'Neill to attend and testify before a grand jury in that state, reciting that he was a "material and necessary" witness in a criminal proceeding and requesting that he be taken in custody and delivered to a New York officer to assure his attendance.

The circuit court, Holt, J., issued an attachment for him and a rule directing him to show cause why he should not be taken in custody, he was arrested, taken before the court, released on bail, filed a response to the rule and a motion to quash.

After a hearing, holding provisions of section 942.02[1]

[1] 942.02 *Summoning witness in this state to testify in another state.*—

(1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

unconstitutional and otherwise invalid, the court granted the motion, denied the application, dismissed the proceeding with prejudice, discharged him from custody, canceled his bond.

O'Neill, an Illinois citizen who came to Florida to attend a convention, was not charged with violating any law of any state, was not a fugitive from justice subject to extradition under the Uniform Extradition Law or the Federal Criminal Extradition Statute.

Section 942.02 contravened the clause in the 14th

---

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

amendment to the federal constitution which provides that no state shall deprive any person of life, liberty or property without due process of law.

Subsection (3) of section 942.02 made no provision for bail, authorized any court of record to order a citizen arrested, held and delivered without bail to an officer of the requesting state to be taken as a prisoner to another state. In Florida a fugitive from justice or a person charged with crime is entitled to bail except in capital cases where the proof of guilt is evident or the presumption great, it is not due process of law to protect the liberty of fugitives from justice or criminals to a greater degree than the liberty of persons not charged with crime.

Section 942.02, by impairing the right of free ingress and egress from state to state, contravened the clause in the 14th amendment to the federal constitution which forbids any state to make or enforce any law which abridges the privileges or immunities of citizens of the United States.

Section 942.02 contravened guaranties in the state and federal constitutions that the people shall be secure in their persons from unreasonable searches and seizures.

The courts of Florida have no jurisdiction to issue process running beyond the territorial limits of the state. A court created within a sovereignty is limited in its sphere of direct action to persons and things within that sovereignty.

Neither the affidavit nor the certificate upon which the application was based, filed under provisions of sub-

section (2) of section 942.02, set forth any facts from which it was made to appear that O'Neill was a "material and necessary" witness, absent such a showing the court could not in any case issue a summons or subpoena, the mere statement of a conclusion that he was a material and necessary witness was insufficient. Section 22 of the declaration of rights of the Florida constitution guarantees the right of the people to be secure in their persons, houses, papers and effects, and that no warrants shall issue "but upon probable cause, supported by oath or affirmation."

The applicant filed notice of appeal to the Supreme Court on August 15, 1956.

Frank S. Hogan, District Attorney, Francis X. Clark, Assistant District Attorney, both of New York City, for the State of New York.

L. J. Cushman, Miami, and S. G. Lippman, Washington, D. C., for respondent.

GEORGE E. HOLT, Circuit Judge.

This is an application by the People of the State of New York for an order requiring Joseph C. O'Neill to attend and testify before the grand jury of New York County, New York, pursuant to provisions of chapter 942, Florida Statutes 1955, the "Uniform Law to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings," which, for the sake of brevity, will hereafter be referred to as the "uniform law"—which was adopted in this state in 1941.

On April 23, 1956 an assistant district attorney in and for New York County, New York, filed in this cause a certificate of a judge of the court of general sessions of the county of New York, supported by an affidavit of an assistant district attorney of that county, certifying that there was then pending in that court a criminal investigation by the Fourth November 1953 grand jury of that county entitled "The People of the State of New York v. John Doe," and that a certain Joseph C. O'Neill, then within Dade County, Florida, was a necessary and material witness for the state of New York in a criminal proceeding being conducted by the grand jury, and requesting that he be taken into immediate custody and delivered to an officer of the state of New York to be conveyed to New York in order to assure his attendance as a witness before the grand jury. Upon presentation of the certificate, this court issued an attachment for O'Neill, and a rule directing him to show cause why an order should not issue to take him into immediate custody and deliver him to an officer of the state of New York to assure his attendance in New York.

O'Neill was forthwith seized and arrested on the attachment and rule to show cause, and brought before this court in custody. Through his attorney he requested time to review the matter upon which the attachment and rule to show cause was based, and to file a response to the rule to show cause. This court fixed bail at $2,500 and allowed him time within which to file his response to the rule to show cause. Thereafter, O'Neill filed his response to the rule and a motion to quash, and this cause came on to be heard on June 18, 1956, on the certificate of the judge of the court of general sessions of New York County, New York, the rule to show cause issued thereon, the response,

and the motion to quash filed by and on behalf of O'Neill, who appeared in person and by counsel, the applicant being represented by Hon. Francis X. Clark, an assistant district attorney in and for the county of New York, assigned to the rackets bureau of the district attorney's office.

By his response to the rule to show cause O'Neill objected to the entry of any order that he be taken into immediate custody, or that he be delivered to an officer of the state of New York, on the ground that the "uniform law" was unconstitutional and void, in that same was in contravention of certain provisions of the constitution of the United States, and the constitution of Florida, and that no sufficient showing had been made that he was or is a necessary and material witness in said criminal proceeding, and other reasons, which will be noted hereinafter. The matter was fully argued by counsel for the respective parties, and the argument was reported, transcribed, and submitted to the court, together with briefs by counsel for the respective parties, all of which have been fully considered by the court.

The "uniform law," first adopted by the National Conference of Commissioners on Uniform State Laws, in 1931, (see note, 24 F.S.A. 288), in point of fact is "uniform" in name only, and in its general over-all outline, because almost every state which has adopted it, has made changes in its text. Although 25 years have elapsed since it was first proposed for adoption by the states and although it has been adopted in somewhat different form by 42 states and the territory of Puerto Rico (see 9 U.L.A. Supp. 33), there appear to be only eleven reported decisions, listed in the appendix to this opinion, in which it

has been considered, construed, or passed upon in any way.

The "uniform law" appears to provide for two methods by which a witness may be compelled to appear and testify as a witness in another state. **First,** by the issuance of a "summons *** directing the witness to attend and testify in the court" of the other state, as provided in subsection (2) of section 942.02; in other words, by the issuance of a witness subpoena by a court of record of this state, directed to the witness, requiring him to go to another state, and appear and testify in the court of such other state. **Second,** by the issuance or entry of an order, provided by subsection (3) of section 942.02, that the witness be taken into immediate custody and delivered to an officer of the requesting state to be taken as a prisoner to the state where his attendance is desired as a witness. The certificate which is the basis for this application seeks to invoke the second method—that is, it recommends the immediate seizure of O'Neill, and his immediate delivery to officers of the state of New York.

The briefs filed by counsel for the applicant and counsel for the respondent have not cited a single reported case in which any court has considered or passed upon the constitutionality of the particular subsection of the "uniform law" (subsection (3) of section 942.02) except In re Allen (1940), 49 Pa. D. & C. 631, in which the court, after fully considering the constitutionality of the Act, held it unconstitutional, and expressly held (text 642-644) that the section attempting to provide for the immediate seizure of the witness and his immediate delivery to officers of the requesting state, is unconstitutional. The only other reported decision which refers to that particular

subsection of the Act is U. S. v. Monjar (C.C.A. 3, 1946), 154 F. 2d 954, 170 A.L.R. 327, in which the court merely refers to said subsection, and holds that it should not be invoked against the clerk of the United States district court for the district of Delaware.

There appear to be only three reported decisions which have considered the constitutionality of the "uniform law"—two in New Jersey, and one in Pennsylvania. In re Allen, supra, decided in 1940, is the earliest of the three decisions, and in a well considered, well supported decision, the court held the Act unconstitutional because—(1) It violates the fourteenth amendment to the Constitution of the United States, which forbids any state to make or enforce any law which abridges the privileges and immunities of citizens of the United States; (2) It violates the clause in the fourteenth amendment to the Constitution of the United States which provides that no state shall deprive any person of life, liberty, or property, without due process of law; and (3) It violates the constitutional guaranty that the people shall be secure in their persons from unreasonable searches and seizures. In re Cooper, 127 N.J.L. 312, 22 A. 2d, 532, decided in 1941, is the next case in which the constitutionality of the Act was considered, but the question does not appear to have been fully presented; nor does it appear to have been fully considered or decided, and in that case, the provision authorizing the immediate seizure of the witness, and his immediate delivery to the officers of the requesting state (subsection (3) of section 942.02) was not involved or considered. The third case, In re Saperstein, 30 N.J. Super. 373, 104 A. 2d 842, cert. den. 75 S. Ct. 110, 348 U.S. 874, 99 L. Ed. 688, decided in 1954, primarily dealt with the question whether the "summons" or subpoena provided for by

the Act (subsection (2), section 942.02) authorized a subpoena duces tecum, and the provision relied upon in the case before the court, subsection (3), was not involved. The only point considered, so far as constitutionality of the Act was concerned, was whether it constituted a "compact" between states, in violation of the third clause of section 10, article I, of the Constitution of the United States, and the court held that it did not constitute such a "compact." Thus, in the only three cases in which the constitutionality of the "uniform law" has been considered, it has been held unconstitutional in one, and in the other two, its constitutionality does not appear to have been carefully or thoroughly argued, considered, or decided, but, in the only case (In re Allen, supra) in which the constitutionality of subsection (3) of section 942.04 has been considered, it was held unconstitutional. In view of the fact that the constitutionality of the "uniform law" has been considered in only three cases during the 25 years which have passed since it was first proposed, and by the courts of only two of the 42 states which have enacted the law (Pennsylvania and New Jersey), it can hardly be said that its constitutionality is settled.

Two other cases have been cited, bearing upon the constitutionality of the Act under consideration—In re Commonwealth of Pennsylvania, (Sup. Ct.), 90 N.Y.S. 808, decided in 1904, and Commonwealth of Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y.S. 713, decided in 1911. The "uniform law" was adopted by the National Commissioners on Uniform State Laws in 1931, 20 years after the decision in the Klaus case, and 27 years after the decision of the case in 90 N.Y.S. 808, both of which involved section 618-a of the New York Code of Criminal Procedure, undoubtedly a forerunner of the "uniform law," but which

did not contain any provision similar to sub-section (3) of sec. 942.02. It is also worthy of note that neither of those cases was decided by the highest court of the state of New York, and in the first (In re Commonwealth of Pennsylvania) the court held the Act to be unconstitutional, while in the second (Commonwealth v. Klaus) the Act was held constitutional by a divided court, with a well-considered, vigorous dissent. In conclusion, it may be said that the constitutionality of the "uniform law" is not settled, but appears to be in grave doubt.

In considering this case, it must be borne in mind that O'Neill is not under indictment in the state of New York, and it is not contended that he is a fugitive from justice so as to make him subject to extradition pursuant to the Uniform Interstate Extradition Law, sections 941.01 to 941.37, Florida Statutes 1955, or under the Federal Criminal Extradition Statute (sections 3181 to 3195, Title 18 U.S.C.A.) expressly authorized by section 2 of article IV of the Constitution of the United States. It appears without question in this case that O'Neill is a citizen of Illinois, and that he resides, and has his home, and office or place of business in that state. He came into the state of Florida on or about April 23, 1956 for a few days' sojourn in connection with a convention which he was attending. He is not charged with having violated any law of the state of New York, or the state of Florida, or any other state.

It is settled beyond controversy or debate that the courts of Florida have no jurisdiction to issue process running beyond the territorial limits of this state, and have no jurisdiction over persons, or property beyond the territorial limits of the state of Florida. "A court created

within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty." Hotchkiss v. Martin (Fla.), 52 So. 2d. 113. Process of one state has no force or validity within the territorial limits of another state, and cannot run beyond the territorial limits of the state. Passett v. Chase, 91 Fla. 522, 107 So. 689. A court created within and for a particular territory is limited in its jurisdiction to such territory, and no judicial process has any force outside such limits. Phillips v. State, 75 Fla. 93, 77 So. 665. "A warrant of arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued." 3 Fla. Jur., Arrest, p. 55. It has been settled ever since Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, that the legislature of a state cannot authorize process running beyond the territorial limits of the state. Under the authorities cited, it is clear that the legislature of this state has no constitutional power to confer jurisdiction upon the courts of this state to issue process running beyond the territorial limits of the state of Florida, and that is the effect of subsection 1 of section 942.02. Just as the legislature of this state is powerless to confer jurisdiction upon this court to issue witness subpoenae or other process running into Georgia, Alabama, or any neighboring state, it is likewise powerless to confer jurisdiction upon this court to issue witness subpoenae or other process running into other states, such as New York. If a witness subpoena were issued by this court commanding a witness to appear before a court of the state of New York, such process would be of no force and effect as compulsory process. Insofar as subsection 1 of section 942.02 attempts to confer any such power, authority, or jurisdiction upon any court of record of this state, it is unconstitutional,

void, and of no effect. Passing for the moment, the fact that the legislature of this state is powerless to confer upon this or any other court of the state of Florida jurisdiction to issue process running beyond the limits of the state, section 942.02 also violates the fourteenth amendment to the Constitution of the United States in that it abridges the privileges and immunities of citizens of the several states, since it impairs the right of free ingress and egress from state to state, which is one of the rights of national citizenship guaranteed by the fourteenth amendment to the Constitution of the United States. Edwards v. California, 314 U.S. 160, 62 S. Ct. 164, 86 L. Ed. 119; In re Allen, supra; Commonwealth v. Klaus, supra; and Commonwealth v. Pennsylvania, supra.

Perhaps the most serious objection to the constitutionality of the "uniform law" (sections 942.01 to 942.04) is found in the provisions of subsection (3) of section 942.02, which attempts to authorize a court of this state to order a citizen not charged with the commission of any crime, or even suspected of having committed any crime, to "be taken into immediate custody and delivered to an officer of the requesting state," or, "in lieu of issuing subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting state." This subsection makes no provision for bail, and if followed literally, does not contemplate or permit bail, but attempts to authorize any court of record to order a citizen to be arrested, seized and held without bail, and to be delivered, without bail, to an officer of the requesting state to be carried away against his will as a prisoner to another state. Neither counsel has cited any reported case holding this subsection of the Act under consideration constitutional. This section was merely

mentioned in passing in U.S. Monjar (C.C.A.3), 154 F. 2d 954, 170 A.L.R. 327, with the observation that should a subpoena be issued to the clerk of the United States court for the district of Delaware, he should not be subjected to the provisions of that section. In the case of In re Allen, supra, the court held that the failure of this section to provide for bail rendered the Act unconstitutional. In discussing this subject the court said at page 643—

> The Statute under consideration with its provisions for taking a witness into custody and delivering him bodily over to the authorities from a foreign jurisdiction is, in our opinion, clearly unreasonable and unwarranted. A person charged with a crime can be taken from one State to another in order that he may be punished for the crime. It is significant that the clause in the Federal Constitution which reads as follows: "A person charged in any State with Treason, Felony, or other crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime"; is part of Section 2 of Article IV of the Federal Constitution, and it immediately follows and thus qualifies the opening sentence of that section which guarantees to the citizens of each State all the privileges and immunities of citizens in the several States.
>
> The authority for extradition is found in the Federal Constitution and the Federal Statutes passed pursuant thereto. See R.S. par. 5278, 18 U.S.C. par. 662. Roberts v. Reilly, 116 U.S. 80, 94 (1885), and Innes v. Tobin, 240 U.S. 127, 131 (1916). It would seem that if it required a provision of the Federal Constitution to provide for the compulsory transfer of a person charged with a crime from one State to another, a fortiori, an Act for the compulsory transfer of an innocent person from one State to another for the purpose of giving viva voce testimony should have like express constitutional authority, and that the Act should permit the proposed witness to enter his recognizance as in extradition proceedings. A fugitive from justice or a person in this State charged with a crime in another State is allowed to enter bail unless the crime with which he is charged is punishable by death or life imprisonment; Act of April 2, 1927, P.L. 327, Sec. 16. Surely, it is not due process of law to protect the liberty of criminals and fugitives from justice to a greater degree than the liberty of honest and law-abiding citizens of this State.

The right to bail in Florida is not a mere "privilege," which may be denied in the court's discretion. The right to bail is absolute, unless the person is charged with a capital offense, and even then, he is entitled to bail unless

the proof of guilt is evident or the presumption great. Ex parte McDaniel, 86 Fla. 145, 97 So. 317; Bozovichar v. State (Ind.), 103 N.E. 2d 680; Section 9, Declaration of Rights of the Constitution of Florida. The right to bail under the Constitution of the United States, and other states is almost universal and unrestricted, except in capital cases where the proof of the prisoner's guilt is evident or the presumption of his guilt is great. See: Section 5, Bill of Rights of the constitution of New York; Eighth Amendment to the Constitution of the United States. "A denial of such right is a deprivation of liberty without due process of law." 3 Fla. Jur., Bail and Recognizance, pp. 37-38.

Subsection 3 of section 942.02, invoked by the applicant in this case, is clearly unconstitutional and void, and the application for an order to take Joseph O'Neill into immediate custody must be and is hereby denied.

Subsection 2 of section 942.02 requires that this court determine that the witness is "material and necessary." Neither the certificate, nor the affidavit upon which it is based, set forth any facts from which this court can determine that O'Neill is a "material and necessary" witness before the grand jury, and the showing made in that respect is no stronger than the showing made in the Application of Stamler (N.Y. 1952), 279 App. Div. 908, 111 N.Y.S. 2d 313, in which the state of New Jersey sought a subpoena order to require Frank Costello to appear and testify as a witness in a criminal proceeding in that state. In that case, the court said—

> Section 618-a of the New York Code of Criminal Procedure contemplates, at the very least, that the Court of the demanding State shall have passed on the question whether the tes-

timony will be material in the prosecution pending in that State. Whether a mere statement that the witness is a material witness would be sufficient without further recital of the charge and the facts upon which the finding of materiality was based, we do not need now to pass upon. At least upon the certificate produced in this case it was improper for the Judge of the Court of General Sessions to grant the subpoena-order without any proof of the materiality of the testimony of the Order.

In State v. Blount (Ore. 1954), 264 P. 2d 419, cert. den. 74 S. Ct. 711, 347 U.S. 962, 98 L. Ed. 1105, the Oregon court held that the showing of the facts required by the "uniform law" to show that the witness is "material and necessary," should at least be as great as the showing required in order to obtain a continuance upon the ground of the absence of a material witness, and that it must appear from a statement of the facts that such witness is "material and necessary," and that a mere statement to that effect is insufficient. In State v. Fouquette (Nev. 1950), 221 P. 2d, 404, cert. den. 71 S. Ct. 799, 341 U.S. 932, 95 L. Ed. 1361; 72 S. Ct. 369, 342 U.S. 928, 96 L. Ed. 691, the court again held that under the Act in question the facts must be stated to show that such a witness is both material and necessary. It is well settled in Florida that in order to secure a continuance upon the ground of the absence of a material witness, the applicant must state the facts to which such witness would testify, in order that the court may determine from the facts that the testimony of the absent witness is material and necessary. Harrell v. Durrance, 9 Fla. 490; Reynolds v. Smith, 49 Fla. 217, 38 So. 903. Tested by this rule, the certificate and the affidavit upon which this application is based fall far short of any showing that O'Neill is a "material and necessary witness" in any proceeding pending in New York. It is a safe rule that in any proceeding in which an application for the seizure of any person is sought, the application should state the facts upon which such application is based

Section 22 of the declaration of rights of the constitution of Florida guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and that no warrants shall be issued but upon probable cause supported by oath and affirmation. Warrants for the arrest of any person can only be issued in this state upon oath indicating a probable violation of the law. Section 901.02, Florida Statutes, 1955, 3 Fla. Jur., Arrest, pp. 48-49; Conrad v. Van Buren, Cir. Judge, 144 Mich. 492, 108 N.W. 347. Neither the affidavit, nor the certificate upon which this application is based set forth any facts from which it is made to appear that O'Neill is a "material and necessary witness," and in the absence of such a showing, this court is not authorized to issue any summons, or subpoena, and the mere statement of a conclusion that he is a material or necessary witness is insufficient. Application of Stamler, supra; State v. Blount, supra; State v. Fouquette, supra.

Upon consideration thereof, the court is of the opinion that the application of the People of the State of New York should be denied, and this proceeding dismissed. It is therefore considered, ordered and adjudged as follows—

That O'Neill's motion to quash and discharge the rule to show cause issued herein and directed to him is granted, the rule to show cause is quashed and discharged, and he is discharged from custody thereunder.

That O'Neill and the surety on his bond posted pursuant to the rule to show cause be, and they and each of them, are discharged of all liability thereunder.

That the attachment issued in this cause for the ar-

rest of Joseph O'Neill described therein as Joseph C. O'Neill, is quashed and dismissed.

That the application of the People of the State of New York for an order requiring Joseph O'Neill to attend and testify before the grand jury of New York County, New York, is denied, and this proceeding dismissed, with prejudice and at the cost of the applicant.

APPENDIX

(1) **People v. Parker** (Cir. Ct. N.J. 1936), 16 N.J. Misc. 471, 1 A. 2d 54. (2) **In re Cooper** (N.J. 1941), 127 N.J.L. 312, 22 A. 2d 532. (3) **In re Saperstein** (Superior Ct. App. Div. N.J. 1954), 30 N.J. Super. 373, 104 A. 2d 842, cert. den. 348 U.S. 874, 75 S. Ct. 110, 99 L. Ed. 688. (4) **U.S. v. Monjar** (C.C. A. 3. 1946), 154 F. 2d 954. (5) **Application of Stamler** (N.Y. 1952), 279 App. Div. 908, 111 N.Y. S. 2d 313. (6) **State v. Blount** (Ore. 1954), 200 Ore. 35, 264 P.2d 419, cert. den. 347 U.S. 962, 74 S. Ct. 711, 98 L. Ed. 1105. (7) **State v. Fouquette** (Nev. 1950), 67 Nev. 505, 221 P. 2d 404, cert. den. 341 U.S. 932, 71 S. Ct. 799, 95 L. Ed. 1361; 342 U.S. 928, 72 S. Ct. 369, 98 L. Ed. 691. (8) **Vore v. State** (Neb. 1954), 158 Neb. 222, 63 N.W. 2d 141. (9) **People v. Simon** (Cal. Dist. Ct. of App. 1951), 107 Cal. App. 2d 105, 236 P. 2d 855, cert. den. 343 U.S. 911, 72 S. Ct. 645, 96 L. Ed. 1327. (10) **State ex rel Butler v. Swenson** (Minn. 1954), 66 N.W. 2d 1. (11) **In re Allen** (1940), 49 Pa. D. & C. 631.

APPENDIX B

Application of the PEOPLE OF the STATE OF NEW YORK for an Order Requiring Joseph C. O'NEILL to Attend and Testify Before the Grand Jury of the County of New York, State of New York.

Supreme Court of Florida.

Jan. 22, 1958.

Rehearing Denied Feb. 24, 1958.

100 So. 2d 149

Proceeding respecting interstate extradition of witness wherein certificate of judge of New York court was filed recommending that named person, an Illinois resident visiting in Florida, should be taken into custody and delivered to New York officer to assure his personal attendance as witness in New York grand jury investigation. The Circuit Court, Dade County, George E. Holt, J., entered judgment holding statute unconstitutional and State appealed. The Supreme Court, Thomas, J., held that statute authorizing state of Florida to take nonresident citizen visiting state into custody and compel his appearance as a witness before court in another state is unconstitutional as violation of Fourteenth Amendment of Federal Constitution.

Affirmed.

Richard W. Ervin, Atty. Gen., Reeves Bowen, Asst. Atty. Gen., and Frank S. Hogan, Dist. Atty., New York County, New York City, for appellant.

L. J. Cushman, Miami, for appellee.

THOMAS, Justice.

On 23 April 1956 there was filed in the Circuit Court of Dade County, Florida, the certificate of Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions of the State of New York, reciting that he had read an affidavit signed by an Assistant District Attorney of the County of New York, recommending that one Joseph C. O'Neill be taken into custody and delivered to an officer of the State of New York to assure his attendance there and that the witness, O'Neill, be brought immediately before the Florida court for hearing on the matter of extradition.

It was stated in the certificate that the District Attorney had been conducting before a grand jury an investigation of the use of funds of certain labor unions and the activities of union officials in the handling of such monies. The grand jury was undertaking to determine whether or not union officials and representatives had conspired to steal funds belonging to the unions in violation of Secs. 580 and 1290 of the Penal Law of New York, McKinney's Consol.Laws, c. 40.

In the certificate O'Neill was designated a material and necessary witness in the investigation. He was described as General President of the Distillery, Rectifying, Wine and Allied Workers' International Union of

America, Chairman of the Executive Board, and Chairman of the Social Security Department which administers the welfare fund of the union. The grand jury purposed to learn from him about disposition of the union's funds.

According to the judge's certificate efforts to procure the attendance of O'Neill had been unsuccessful and he had refused to appear voluntarily and testify. Inasmuch as he resided in Illinois, in which no reciprocal witness statute has been enacted, the office of the District Attorney could not compel his presence.

Continuing, it was stated that the District Attorney learned that a convention of the union would be held in Miami 23 April 1956 and that under the constitution of the union the president, O'Neill, was required to be present and preside.

By the certificate O'Neill was assured of protection from arrest or service of civil and criminal process in connection with matters arising before his entrance into New York should he appear under court order.

We see no occasion to give a summary of the statements in the affidavit of the Assistant District Attorney as they seem harmonious with the ones appearing in the judge's certificate which contains sufficient information for determination of the points in controversy.

There was incorporated in the affidavit the request that the court under Sec. 618-a of the New York Code of Criminal Procedure issue the certificate we have described.

Upon the filing of the certificate in the Circuit Court of Dade County the judge ordered the sheriff to attach O'Neill and bring him forthwith before the court to show cause why an order should not immediately issue for his custody and his delivery to an officer of the State of New York. Evidently the same day the certificate was filed O'Neill was apprehended and gave bond, although there is no provision in our statute, Sec. 942.02, Florida Statutes 1955, F.S.A., for such a bond.

A month later O'Neill filed a response and after another month had passed a hearing was held by the circuit judge when arguments of Assistant District Attorneys from New York and O'Neill's counsel were presented but at which no testimony was taken. Subsequently the judge, basing his opinion on the record, concluded that Sec. 942.02, supra, was unconstitutional because by it the state was given extraterritorial jurisdiction, the right of ingress and egress across the state line was impaired and the witness could be taken into custody here and delivered into custody of an officer of another state without bail. Also, the judge thought the certificate of the Judge of the Court of General Sessions of New York and the affidavit of the Assistant District Attorney did not depict a situation showing that O'Neill was a material and necessary witness.

We dismiss the last point with the observation that it is plain to us O'Neill is a material and necessary witness in the investigation of the misuse of funds of the union. By the terms of the act, the certificate of the judge must be taken as "prima facie evidence of all the facts stated therein." It may be logically deduced that because of the positions held by O'Neill he is familiar

with the funds of the organization if, indeed, he does not supervise or control them, and we think that in an investigation of the administration of those funds he would prove a material and necessary witness.

It is stated in the brief of the Attorney General that the "appellant" filed a notice of appeal and filed "its" assignments of error and "its" directions to the clerk.

Upon an examination of the record, we find that the notice of appeal was filed by "The Applicant, the People of the State of New York" and that it, the assignments of error and the directions to the clerk, carried the names of the District Attorney of New York County, the Attorney General of Florida, the State Attorney of the Eleventh Judicial Circuit and an Assistant State Attorney but were signed only by the Assistant State Attorney. On the notice of appeal these officers were described as attorneys for "applicant" and on the assignments of error and directions to the clerk, as attorneys for "appellant".

Soon after the appeal was lodged here the attorney for Joseph C. O'Neill moved to dismiss it, and the members of the court sitting at the time deferred a ruling until hearing of the cause on the merits.

We have now reconsidered the motion and have concluded we should proceed to a determination of the dispute on the merits, that is, the adjudication of the validity of Sec. 942.02, supra. The motion was based on the ground that this court had no jurisdiction because the order attempted to be reviewed was entered in a criminal proceeding and the state had no right to appeal except

from orders specified in Sec. 924.07, Florida Statutes 1955, F.S.A., of which the order of the circuit judge was not one, and further that the People of the State of New York had no right of appeal. The Attorney General countered on the ground that the case was a civil proceeding and asked this court to consider the appeal a petition for certiorari, under Sec. 59.45, Florida Statutes 1955, F.S.A., if it appeared that the appeal had been improvidently taken.

[1] We agree with the Attorney General that the proceeding is not criminal and that appeal was the proper method of review as, by Sec. 5 of Art. V of the Constitution, F.S.A., this court had "appellate jurisdiction in all cases at law * * * originating in Circuit Courts * * *." The case originated in the circuit court and the appeal was filed before the effective date of the amendment of Art. V adopted in November 1956.

[2] The procedure followed by the Attorney General is rather unusual because the record does not show any participation by him until the circuit judge had ruled. His name first appears on the notice of appeal. But the State of New York, in our opinion, had the right to appeal as O'Neill would have had if the judgment had been unfavorable to him. The appeal became effective when the notice was filed by the District Attorney of New York County. The introduction of the Attorney General into the controversy was somewhat unorthodox but in view of the mandate in Sec. 22 of Art. IV of the Constitution that he "perform such other legal duties as may be prescribed by law" and the requirement of Sec. 16.01, Florida Statutes 1955, F.S.A., that he "appear in and attend to in behalf of the state, all suits or prosecutions,

civil or criminal, or in equity, in which the state may be a party, or in any wise interested * * *" we will consider his entrance via the notice of appeal an effort to present the interest of the state in the preservation of the statute. This concern of the state in maintaining the validity of the law comes from the law's reciprocal nature. If the act is held unconstitutional, then, of course, the attendance here of witnesses residing in states having such a uniform act cannot be accomplished.

The act is known as the "'uniform law to secure the attendance of witnesses from within or without a state in criminal proceedings.'" Sec. 942.06, Florida Statutes 1955, and F.S.A., and is "only applicable to such state as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses" as provided in it. Sec. 942.05, Florida Statutes 1955, F.S.A. It was enacted in New York, Code of Criminal Procedure 618-a, supra.

We return now to the procedure outlined. If it is recommended in the certificate that the witness be taken into immediate custody and delivered to an officer of the state making the request, the judge may, instead of notification of the hearing, order the witness brought before him at once. Such a recommendation was made in this case and such an order was initially entered. It is provided in the act that if at the hearing the custody and delivery appear to the resident judge 'desirable', he may order the witness placed in custody and delivered to an officer of the state making the request.

Evidently The People of the State of New York intended by the certificate of the judge to coerce the at-

tendance of O'Neill by one process or the other but preferred to have the witness taken into custody. When the circuit judge in Dade County entertained the certificate, two courses were available. He could have notified the prospective witness of a hearing to determine whether or not the witness should be subpoenaed to testify before the grand jury in New York. On the other hand, in view of the recommendation that the witness be taken into custody, the judge could have directed that the witness be immediately brought before him and then, if the judge was "satified of the desirability" that the witness should be placed in custody and delivered to an officer of the State of New York, he could have followed that procedure instead of issuing a subpoena.

The latter course seems to have been first chosen by the circuit judge, but upon hearing he decided not to put O'Neill in custody or place him under summons because of his conviction that the whole act was invalid.

In the circumstances it seems to be our obligation to decide the constitutionality of Sec. 942.02, supra, whether the procedure be to seize and deliver a witness or to place him under subpoena. We will discuss the two aspects in that order.

Certain salient facts should be remembered in judging the merits of the act as it would operate on O'Neill. He is not charged with crime. On the contrary, it is stated in the judge's certificate that the laws of New York would guarantee O'Neill, if taken there pursuant to this proceeding, protection from arrest and the service of criminal process. Parenthetically, this assurance was given in the certificate but it is extremely doubtful if

the act itself provides for such a safeguard, except in the case where a summons is issued as distinguished from seizure and delivery of the witness.

Although the uniform law was adopted by The National Conference of Commissioners on Uniform State Laws more than a quarter century ago and, incidentally, enacted by this State in 1941, there is a dearth of judicial decision on its operation and validity.

It appears from the opnion of the circuit judge and the brief filed by the appellee that but one court has passed directly upon the provisions of the act attempting to authorize the summary procedure, namely, a District and County Court of Pennsylvania in In Re Allen, 49 Pa.Dist. & Co.R. 631. The court seems to have primarily considered the title of the act under attack, but it did declare the provisions for seizure of a witness and his delivery to the officer of a foreign state invalid because they violated Sec. 2 of Art. IV and the privileges and immunities provision of the Fourteenth Amendment of the Federal Constitution. The Constitutionality of the uniform act was considered in In Re Cooper, 127, N.J.L. 312, 22 A.2d 532, and in In Re Saperstein, 30 N.J.Super. 373, 104 A.2d 842, but in neither of these was the validity of the particular provisions for seizure and delivery of a witness specifically determined. In the former it was contended that the title of the act was not sufficient to make a witness for a defendant subject to its provisions with reference to the issuance of subpoenas. It is true that the provisions for seizure of a witness were assailed but clearly no attempt to invoke them had been made. In the latter decision the points presented were not the same as those we are considering.

[3] By the Fourteenth Amendment of the Constitution of the United States the states are enjoined from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States * * *." It also contains the guarantee that a state shall not deprive a person of liberty "without due process of law." And in the first paragraph of Sec. 2 of Art. IV of the Constitution is incoporated the guarantee that also seems immediately involved in the question whether or not a person who is not charged with crime of any sort may be restrained of his freedom because he is needed elsewhere as a witness in an investigation by a grand jury. Not only are the privileges and immunities of citizens of the United States placed beyond the power of the state to impair but citizens of each state are vouchsafed the privileges and immunities of the citizens of all the states. The following paragraph of Sec. 2 of Art. IV gives emphasis to the preceding one and forms an exception to it for such privileges and immunities are not guaranteed to the person charged with "Treason, Felony, or other Crime" who flees from justice. The state to which he flees must deliver him up "on Demand of the executive Authority of the State from which he fled * * *."

We agree with the circuit judge that the right of O'Neill to ingress and egress would be impaired if not destroyed if the circuit judge were to order his seizure, as was 'recommended'. He would no longer have been allowed freely to pass from the State of Florida to another state but would have been taken to New York whether or not he wished to go there and he would have been prevented from returning to his home state of Illinois although it is quite clear that he came to this state for a visit of but a few days to attend a convention.

[4] We think the provisions of the Fourteenth Amendment forbade the passage by the legislature of Florida of a law which would so interfere with the movement of a citizen of the United States who as a citizen of Illinois was privleged to move freely from his state to Florida and back. This privilege would have been nullified, of course, had he become a fugitive from justice which is not the case.

In Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 18, 53 L.Ed. 97, it was written: "Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, supra, [16 Wall. 36], at page 79 [21 L.Ed. 394]; Re Kemmler, 136, U.S. 436, 448, 10 S.Ct. 930, 34 L.Ed. 519, 524; Duncan v. State of Missouri, 152 U.S. 377, 382, 14 S.Ct. 570, 38 L.Ed. 485, 487. Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (Crandall v. State of Nevada, 6 Wall. 35, 18 L.Ed. 745); * * *."

We think that operation of the statute in question would constitute a definite interference with the right of a citizen of the state and of the United States to move freely from one state to another, and we think of no better illustration than what would have occurred in this case had the circuit judge accepted the 'recommendation' and found it 'desirable' to send O'Neill to New York in custody. A Citizen of Illinois, comes to Florida for a brief visit; he is haled into court and confronted with an order placing him in custody of an officer who

will conduct him to New York. His privilege of staying, or returning to his home in Illinois, or of going elsewhere, is brought to an end. It is difficult to imagine a harsher infringement of the right a citizen has to go from place to place which is a privilege, according to the expressions of the Supreme Court of the United States, secured to him under the Fourteenth Amendment.

[5] O'Neill is entitled under Sec. 2 of Art. IV, supra, to all the privileges and immunities of all the citizens of all the other states so long as he has not committed crime for which he could be extradited. The power to remove him in this isolated situation is found in that section. The courts have held that this kind of extradition depends on the Constitution of the United States, People ex rel. Corkran v. Hyatt, 172 N.Y. 176, 64 N.E. 825, 60 L.R.A. 774, and not on comity, courtesy or contract. Ex parte Thompson, 85 N.J.Eq. 221, 96 A. 102.

We think the matter is purely one of conflict with the Federal Constitution; that the act violates the constitution, and consequently cannot be upheld.

Inasmuch as the circuit judge apparently could have put the witness under subpoena if he concluded against the "desirability" of placing him in custody and could have bound the witness to appear, or be held in contempt, and since the judge held the whole act unconsitutional and discharged O'Neill, we decide, too, the question of the validity of the law as it would be applied in the other instance.

[6] It was the view of the circuit judge that the courts of this state were without power to issue process effective beyond the borders of the state. This general

rule we understand is true. Passett v. Chase, 91 Fla. 522, 107 So. 689. Nor can civil process operate beyond the limits of the state so as to form a basis for a money judgment against one residing without although he has been made a party to the litigation by constructive service. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

Because we believe, after careful study, that this feature of the law is unconstitutional, for the reasons we have given, we find no occasion to discuss the question whether or not it violates Secs. 9 and 12 of the Declaration of Rights of the Constitution of Florida, F.S.A. and the Eighth and Fourteenth Amendments of the Constitution of the United States because no bail is provided for persons attached and delivered into custody of an officer of another state.

[7] We ask the rhetorical question: How, then can a Florida court enforce an order to appear before a court of another state when the operation of the order clearly extends beyond state limits? While any person is within the boundaries of this state he is subject to orders entered against him by courts properly exercising their jurisdiction, but it would be inconsistent with the decisions cited to hold that such a court could command a witness to appear in New York, send him on his way, then, if the witness did not appear in New York, punish him here for his failure there "in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state." It is not clear just what court would administer the punishment in the event of default because that part of the act provides that "he shall be punished" in the manner described. Conceivably his failure would be contemptuous

of both courts. If the Florida court attempted to inflict punishment, it would be for failure to comply in New York; if the New York court undertook to inflict punishment, it would be for failure to obey a summons set in motion in Florida. Either way the Florida process would be operating extra-territorially.

The Attorney General concedes in his brief that the Supreme Court of the United States has held that among the privileges of American citizenship guaranteed by the Fourteenth Amendment is the right to pass freely from state to state, citing Twining v. New Jersey, supra. He takes the position that Sec. 2 of Art. IV has no application to the facts of this case because, as we understand it, the statute, Sec. 942.02, does not discriminate between the citizens of Florida and the citizens of any other state. This would mean that O'Neill, a sojourner from Illinois, could be summarily put in custody or placed under subpoena, because any citizen of Florida could be treated the same way. To extend this argument the law would be valid because in those states that have adopted it any person could be placed in custody or put under subpoena, to coerce his appearance as a witness in any other state that had adopted the law.

This might be an answer to a charge of discrimination but it does not follow that if a law is invalid for some reason it should nevertheless be held good because, bad as it is, it affects all persons the same.

As we interpret the Fourteenth Amendment, the citizens of Florida and New York which have adopted the uniform law, may, as citizens of the United States, go where they please, and so may the citizens of Illinois

and other states that have not enacted it. If, aside from the question now of discrimination, a citizen of a state having no such law, Illinois, travels to a state having it, Florida, and there is made subject to the law because another state, New York, thinks his presence there is 'desirable', it cannot be true that the right of all the citizens of all the states to move among them has not been impaired.

The Attorney General quotes liberally from the opinion in Commonwealth of Massachusetts v. Klaus, 145 App. Div. 798, 130 N.Y.S. 713, 717, decided by the Appellate Division of the Supreme Court of New York, and italicizes a statement in the opinion of that court that it was conceded in the brief "that the right of free ingress and egress was never intended to enable a citizen of the United States to interfere with the orderly administration of justice within the territorial boundaries of the state" and that a citizen when "within the boundaries of a state" is amenable to the constitution and laws of that state and that the privileges and immunities clause affords him only protection against unjust discrimination. This concession, said the court, was a complete answer to the charge that a law, similar to the one before us, was unconstitutional. So this decision helps us little.

We are not able so easily to decide the matter before us for we do not think that Sec. 2 of Art. IV read with the pertinent part of the Fourteenth Amendment justifies the view that no rights are abridged if no discrimination is practiced.

The Attorney General argues that "[n]o power was delegated * * * to the United States to require free in-

gress and egress when to do so would defeat one of the primary purposes for which the state governments were instituted, viz., the protection of the people from **criminals.**" (emphasis ours.) Nor does the Constitution prohibit the states from impairing the right of free ingress and egress to the extent required to protect themselves against **criminals.**

We do not find in the provisions of the law a basis for the position. The act refers to prosecutions and grand jury investigations but we have ascertained nothing in it with reference to restricting such testimony to use by the state in either. The procedure is inaugurated by a certificate of a judge of record of the requesting state that the person sought to be extradited "is a material witness in such prosecution, or * * * investigation." We have supplied the emphasis. Furthermore, the preceding section, Sec. 942.01, Florida Statutes 1955, F.S.A., titled "Definitions" contains the following: " 'Witness'—as used in this chapter [942], shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding held by the prosecution **or the defense.**" (Emphasis ours.) So, evidently the procedure would be available to a defendant as well as the prosecution.

[8] We realize that the right of ingress and egress is not absolute, for instance, the Fourteenth Amendment does not limit exercise by the state of the police power to protect the health, morals and general welfare of the people. Butchers' Union S. H. and L. S. L. Co. v. Crescent City L. S. L. and S. H. Co., 111 U.S. 746, 4 S.Ct. 652, 28 L. Ed. 585. But we do not discern in the present state of facts any of the elements of an exception.

The Attorney General concedes that circumstances might exist under which bodily delivery of a witness would be unreasonable and that "it was never intended to authorize the delivery of a witness * * * where the circumstances are such that it would be unreasonable to do so * * *." This statement is followed by the remark: "when the statute is thusly construed there is nothing unreasonable about it." In this connection we refer, again, to the procedure. If the judge of the demanding state certifies the 'desirability' of bodily delivery, it shall be prima facie evidence of the 'desirability' and the judge here may, if satisfied with the 'desirability', have the witness taken into custody. We cannot decide the constitutionality or unconstitutionality of the act under attack by simply saying that if the circumstances are reasonable there is nothing unreasonable about the act.

After a careful study of both features of the law, we are convinced that it is unconstitutional and that the circuit judge ruled correctly when he held it so.

Affirmed.

TERRELL, C. J., and HOBSON, THORNAL and O'CONNELL, JJ., concur.